Ironton Publications, Inc. *and* Athens Printing Pressmen and Assistants Union No. 269–M, affiliated with Graphic Communications International Union, AFL–CIO–CLC. Cases 9–CA–30992, 9–CA–31030, 9–CA–31148, 9–CA–31236, 9–CA–31358, 9–CA–31447, 9–CA–31517, 9–CA–31686, 9–CA–31805–1 & 2

August 23, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On December 14, 1994, Administrative Law Judge Richard A. Scully issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed limited cross-exceptions and a supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified and set forth in full below.[3]

1. The judge dismissed the allegation that the Respondent violated Section 8(a)(5) and (1) by unilaterally granting a merit increase to assistant pressroom foreman Jack Day. The judge found that the Union waived its statutory right to bargain over the timing and amount of merit increases based on Article V of the parties' collective-bargaining agreement.[4] The General Counsel excepts, arguing, inter alia, that the collective-bargaining agreement relied on by the judge to find waiver expired May 7, 1993, and that Day received the merit raises at issue here in October 1993 and in January 1994, after the contract expired. We find merit in the General Counsel's exception.

Even assuming that Article V constituted a valid waiver of the Union's statutory right to bargain over merit increases, the waiver did not survive the May 7, 1993 expiration of the contract so as to privilege the Respondent's unilateral grant of merit increases to employee Day in October 1993 and January 1994. It is well settled that the waiver of a union's right to bargain does not outlive the contract that contains it, absent some evidence of the parties' intentions to the contrary. *Buck Creek Coal*, 310 NLRB 1240 fn. 1 (1993); *Control Services*, 303 NLRB 481, 484 (1991), enfd. 961 F.2d 1568 (3d Cir. 1992); *Holiday Inn of Victorville*, 284 NLRB 916 (1987). The record contains no evidence that the Respondent and the Union here intended this waiver to be effective beyond the term of the collective-bargaining agreement.[5] Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) by unilaterally granting wage increases to employee Jack Day in October 1993 and January 1994.

2. The General Counsel excepts to the judge's failure to find that the Respondent violated Section 8(a)(3), (4), and (1) of the Act by failing to give raises

[1] As discussed below, the General Counsel and the Respondent each filed memoranda concerning the impact on this case of the United States Court of Appeals for the Sixth Circuit's unpublished decision in *Ironton Publications, Inc. v. NLRB*, 151 LRRM 2224 (1995)(per curiam), vacating in part 313 NLRB 1208 (1994). Chairman Gould and Member Cohen did not participate in the prior Board decision.

[2] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In agreeing with the judge's dismissal of the complaint allegation that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally removing certain camera work, historically performed by pressroom employees, from the pressroom unit and reassigning it to nonbargaining unit employees, we rely solely on the fact that the change in camera work did not have a significant impact on the bargaining unit. The change was, therefore, not a material, substantial change in the work of the pressroom employees.

For the reasons set forth by the judge, we agree that pressroom assistant foreman Jack Day and mailroom assistant foreman Roger Jenkins are not supervisors within the meaning of Sec. 2(11) of the Act. We have long held that the burden of proving supervisory status is on the party alleging that such status exists. See, e.g., *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979). Contrary to the Board, the Sixth Circuit has held that in bargaining unit determinations the burden of proving that an employee is not a supervisor rests with the Board. See, e.g., *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076, 1080 (6th Cir. 1987). See generally, *Northcrest Nursing Home*, 313 NLRB 491 (1993). Although we disagree with the Sixth Circuit's allocation of burdens, and we note that this is not a representation case, we find that even under the Sixth Circuit's standard the General Counsel has shown that neither individual is a statutory supervisor.

[3] We shall modify the recommended Order and notice to remedy all the unfair labor practices found by the judge which we affirm, as well as the additional violation of Sec. 8(a)(5) and (1), discussed below.

We shall modify the judge's recommended Order in accordance with our recent decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[4] In pertinent part, Art. V provides:

> The Publisher shall have the right, in his sole discretion, to award merit increases; however, any merit pay increase awarded during the term of the agreement shall continue until the expiration date of the agreement.

[5] In its exceptions, the Respondent also argues that its refusal to bargain over the layoff and failure to recall James Jenkins, and the requirement that pressroom employees empty trash cans, was similarly justified because the management rights clause of the expired contract constituted a waiver of the Union's right to bargain over these subjects. Assuming arguendo that the management rights clause did constitute a waiver, we conclude, for the same reasons as those set forth above, that the waiver did not survive the expiration of the contract.

to mailroom employees Shawn and James Jenkins. The complaint alleges that ''[i]n September 1993 . . . the Respondent failed to grant a pay raise to its employees Shawn Jenkins and James Jenkins'' in violation of Section 8(a)(3), (4), and (1). The General Counsel relies, in substantial part, on the raise given to mailroom employee Chris Strait in about September 1993 as evidence that the Jenkinses were discriminatorily denied pay raises. The judge did not address this allegation; we shall dismiss it.

Although we find that the General Counsel established a prima facie case under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), that Shawn Jenkins and James Jenkins were denied a requested pay raise in September 1993 because of their union activities and their involvement in the proceedings that led to *Ironton Publications*, 313 NLRB 1208 (1994) (*Ironton I*), we find that the Respondent has rebutted the General Counsel's prima facie case by demonstrating that the Jenkinses were not treated in a disparate manner. Specifically, the uncontroverted testimony of mailroom foreman Gary Creger establishes that Strait initially worked for the Respondent as a part-time employee in the maintenance department (a nonunit position) and helped out in the mailroom when needed. Creger testified that eventually, Strait was needed more in the mailroom than in maintenance; therefore, Strait was made a full-time mailroom employee and received a 25-cent-per-hour raise. Strait continued to perform some maintenance duties after he became full time in the mailroom. Inasmuch as neither James nor Shawn Jenkins converted from part-time to full-time status or performed nonunit maintenance work in addition to their mailroom duties at the time they requested a raise in pay, the Respondent has shown that it relied on legitimate considerations in treating Strait differently and that the Jenkinses were not discriminatorily denied a pay raise. Accordingly, we shall dismiss this allegation of the complaint.

3. Following the issuance of the judge's decision, while this case was pending before the Board on exceptions, the Sixth Circuit rendered its unpublished decision in *Ironton Publications, Inc. v. NLRB*, 151 LRRM 2224 (1995) (per curiam). The Sixth Circuit enforced the Board's decision in *Ironton I*, supra, in all respects except that the court found that neither the Respondent's changing James Jenkins' terms and conditions of employment to comply with the pressroom collective-bargaining agreement nor the Respondent's failure to promote James Jenkins to the assistant pressroom foreman position violated the Act.

We have considered the General Counsel's and the Respondent's memoranda addressing the impact of the Sixth Circuit's decision on the issues in this case. We have decided, in the unusual circumstances presented here, to accept the court's opinion for purposes of this case.

A. In its memorandum, the Respondent urges the Board to dismiss the unfair labor practice allegations pertaining to the reduction in Roger Jenkins' benefits when he was transferred to a full-time pressroom position. The Respondent asserts that it changed Roger's benefits in order to comply with the terms and conditions of employment provided in the pressroom collective-bargaining agreement.

The judge found that the Respondent violated Section 8(a)(1), (3), (4), and (5) by denying a Christmas bonus and participation in the Respondent's profit-sharing plan to Roger and by reducing his vacation benefits when he was transferred into the pressroom full time. In so finding, the judge specifically noted that the Respondent's conduct was the same as the Board found unlawful in *Ironton I* with respect to James Jenkins.

As stated above, we have decided to accept, for purposes of this case, the court's decision dismissing the allegations related to the reduction of James' benefits. Accordingly, because we agree with the judge that the Respondent's conduct with respect to reducing Roger's benefits was the same as its conduct with respect to reducing James' benefits, and the legal issue is the same, we must dismiss the allegations concerning the unilateral and discriminatory reduction of Roger Jenkins' benefits.

B. In its memorandum concerning *Ironton Publications v. NLRB*, supra, the Respondent argues that the Board must dismiss the judge's finding here that the Respondent violated Section 8(a)(3), (4), and (1) by laying off and failing to recall James Jenkins to the pressroom. Specifically, the Respondent asserts that the judge based his finding of the Respondent's animus toward James on its refusal in *Ironton I* to promote James to assistant foreman in the pressroom and that, because the Sixth Circuit denied enforcement of the violation concerning the refusal to promote, the allegation regarding James' layoff and recall must likewise fail. We find no merit in the Respondent's argument.

Although we have accepted, for purposes of this case, the Sixth Circuit's holding that the Respondent's failure to promote James to assistant pressroom foreman did not violate the Act, we nonetheless find no lack of evidence of the Respondent's antiunion animus. The Respondent's unfair labor practice conduct found by the Board in *Ironton I* and enforced by the Sixth Circuit provides ample evidence of the Respondent's antiunion animus. In particular, the Respondent unlawfully promulgated and maintained a rule prohibiting employees from discussing their wages, salaries, and pay raises with other employees; discriminatorily reduced mailroom employee Jeff Clutters' work hours; discriminatorily placed James Jenkins in a 4-year train-

ing program; discriminatorily transferred Roger Jenkins out of the pressroom bargaining unit; discriminatorily failed to compensate Roger Jenkins for serving as assistant mailroom foreman; and discriminatorily issued written disciplinary warnings to and placed Jeff Clutters, Roger Jenkins, and Shawn Jenkins on probation.

Additionally, we note that in this case, the Respondent has persisted unrelentingly in its course of unlawful conduct, not only by discriminating against its employees because they engaged in protected concerted activities, but also because they participated in proceedings conducted by the Board.[6] Further, the Respondent unilaterally, and in derogation of its collective-bargaining obligation to the Union, laid off employees, made changes to the employee handbook, and changed the employees' method of compensation.[7] Most of this conduct postdates the unlawful layoff and failure to recall James to the pressroom and, therefore, alone would not establish animus; however, when considered in light of the Respondent's unlawful conduct in *Ironton I*, detailed above, we must find that the Respondent has continued to display hostility toward its employees' Section 7 rights.

We agree with the judge that the Respondent has not met its *Wright Line*[8] burden of demonstrating that it would have laid off and failed to recall James Jenkins even absent his protected concerted activities and his participation in proceedings before the Board. We reject the Respondent's assertion that it had no choice but to lay off James from the pressroom in order to avoid overstaffing. We note that, contrary to the Respondent's assertion, James was not the only nonsupervisory employee working in the pressroom bargaining unit when Roger was transferred; Jack Day, the assistant foreman, was also a bargaining unit employee. *Ironton Publications, Inc.*, 313 NLRB 1208, 1212 (1994). We will not substitute our own business judgment for that of the Respondent by specifying the way the Respondent should have handled whatever overstaffing problem it may have faced, but we stress that the Respondent had many other, nondiscriminatory options available. The Respondent has not explained its failure to implement these options. Accordingly, we find, consistent with the judge, that the Respondent violated Section 8(a)(3), (4), and (1) by laying off and failing to recall James Jenkins to the pressroom bargaining unit.

[6] The Respondent's Sec. 8(a)(3) and (4) conduct in this case which tends to show the Respondent's antiunion animus includes, inter alia, discriminatorily reprimanding Roger Jenkins, requiring pressroom employees to empty trash cans, changing the requirements of the assistant mailroom foreman position to make it more onerous and to convert it to a supervisory position, issuing three disciplinary reprimands to Shawn Jenkins and denying him paid sick leave, and discharging James Jenkins.

[7] Specifically, the Respondent violated Sec. 8(a)(5) and (1) by laying off mailroom employees Lavanda Boyd, Philip Barker, Danny Jenkins, and Bonita Smith; issuing a revised employee handbook containing a new smoking policy and changes to provisions concerning employee breaks, absences and tardiness, and probationary period; and changing part-time mailroom employees' compensation from piece rate to hourly rate.

[8] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

ORDER

The National Labor Relations Board orders that the Respondent, Ironton Publications, Inc., Ironton, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, laying off, or otherwise discriminating against employees because they engage in protected concerted activity or participate in proceedings conducted by the National Labor Relations Board.

(b) Issuing disciplinary reprimands and/or placing employees on probation because they engage in protected concerted activity or participate in proceedings conducted by the National Labor Relations Board.

(c) Issuing job descriptions containing more onerous duties or converting a bargaining unit position to a supervisory position because employees engage in protected concerted activity or participate in proceedings conducted by the National Labor Relations Board.

(d) Imposing additional duties on employees because they engage in protected concerted activity or participate in proceedings conducted by the National Labor Relations Board.

(e) Denying employees paid sick leave because they engage in protected concerted activity or participate in proceedings conducted by the National Labor Relations Board.

(f) Unilaterally laying off employees without giving the Union prior notice and opportunity to bargain.

(g) Unilaterally changing employees' wages and other terms and conditions of employment without giving the Union prior notice and opportunity to bargain.

(h) Unilaterally changing employees' job duties and making bargaining unit positions supervisory without giving the Union prior notice and opportunity to bargain.

(i) Unilaterally issuing a revised employee handbook containing significant changes in personnel policies without giving the Union prior notice and opportunity to bargain.

(j) Unilaterally granting employees merit increases without giving the Union prior notice and opportunity to bargain.

(k) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer James Jenkins, Philip Barker, Lavanda Boyd, Danny

Jenkins, and Bonita Smith full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make whole James Jenkins, Philip Barker, Lavanda Boyd, Danny Jenkins, and Bonita Smith for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Make whole Roger Jenkins for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful change in the duties of the mailroom assistant foreman, in the manner set forth in the remedy section of the judge's decision.

(d) Make whole Shawn Jenkins for any loss of earnings and other benefits suffered as a result of the Respondent's denial of paid sick leave benefits, in the manner set forth in the remedy section of the judge's decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of James Jenkins, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful disciplinary reprimands issued to Roger Jenkins and Shawn Jenkins, and within 3 days thereafter notify them in writing that this has been done and that the disciplinary reprimands will not be used against them in any way.

(g) Rescind the revised employee handbook issued in August 1993.

(h) Rescind the job description issued July 13, 1993, for the assistant foreman of the mailroom.

(i) On request of the Union, reinstate the duties of the assistant foreman of the mailroom as they existed prior to July 13, 1993, the piece rate for hand inserters, and the personnel policies concerning employee breaks, absence and tardiness, probationary period, and smoking.

(j) Rescind the requirement that pressroom employees empty trash cans.

(k) On request of the Union, rescind the merit increases granted to Jack Day in October 1993 and January 1994.

(l) Notify and bargain on request with the Union concerning all proposed changes to the terms and conditions of employment of employees in the following appropriate units:

Mailroom Unit

All mailroom employees employed by Respondent at its Ironton, Ohio facility, excluding all other employees, and all professional employees, guards and supervisors as defined in the Act.

Pressroom Unit

All employees employed in the operation of Respondent's pressroom, including the camera, offset platemaking and all press operations, excluding all other employees, and all professional employees, guards and supervisors as defined in the Act.

(m) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(n) Within 14 days after service by the Region, post at its facility in Ironton, Ohio copies of the attached notice marked ''Appendix.''[9] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 5, 1993.

(o) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply with this Order.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, layoff, or otherwise discriminate against you because you engage in protected concerted activity or because you participate in proceedings conducted by the National Labor Relations Board.

WE WILL NOT issue disciplinary reprimands and/or put you on probation because you engage in protected concerted activity or because you participate in proceedings conducted by the National Labor Relations Board.

WE WILL NOT issue job descriptions containing more onerous duties or converting a bargaining unit position to a supervisory position because you engage in protected concerted activity or because you participate in proceedings conducted by the National Labor Relations Board.

WE WILL NOT impose additional duties on you because you engage in protected concerted activity or because you participate in proceedings conducted by the National Labor Relations Board.

WE WILL NOT deny you paid sick leave because you engage in protected concerted activity or because you participate in proceedings conducted by the National Labor Relations Board.

WE WILL NOT unilaterally lay you off without giving Athens Printing Pressmen and Assistants Union No. 269–M, affiliated with Graphic Communications International Union, AFL–CIO–CLC, prior notice and opportunity to bargain.

WE WILL NOT unilaterally change your wages or other terms and conditions of employment without giving the Union prior notice and opportunity to bargain.

WE WILL NOT unilaterally change your job duties or make your bargaining unit position supervisory without giving the Union prior notice and opportunity to bargain.

WE WILL NOT unilaterally issue a revised employee handbook containing significant changes in personnel policies without giving the Union prior notice and opportunity to bargain.

WE WILL NOT unilaterally grant you merit increases without giving the Union prior notice and opportunity to bargain.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer James Jenkins, Philip Barker, Lavanda Boyd, Danny Jenkins, and Bonita Smith full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole James Jenkins, Philip Barker, Lavanda Boyd, Danny Jenkins, and Bonita Smith for any loss of earnings and other benefits resulting from their layoff or discharge, plus interest.

WE WILL make whole Roger Jenkins for any loss of earnings and other benefits resulting from our changing the duties of the mailroom assistant foreman, plus interest.

WE WILL make whole Shawn Jenkins for any loss of earnings and other benefits resulting from our denying him paid sick leave benefits, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharge of James Jenkins, and *we will*, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the disciplinary reprimands issued to Roger Jenkins and Shawn Jenkins, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the disciplinary reprimands will not be used against them in any way.

WE WILL rescind the revised employee handbook issued in August 1993.

WE WILL rescind the job description issued July 13, 1993, for the assistant foreman of the mailroom.

WE WILL, on request of the Union, reinstate the duties of the assistant foreman of the mailroom as they existed prior to July 13, 1993, the piece rate for hand inserters, and the personnel policies concerning employee breaks, absence and tardiness, probationary period, and smoking.

WE WILL rescind the requirement that pressroom employees empty trash cans.

WE WILL, on request of the Union, rescind the merit increases granted to Jack Day in October 1993 and January 1994.

WE WILL notify and bargain on request with the Union concerning all proposed changes to the terms and conditions of employment of our bargaining unit employees in the following appropriate units:

Mailroom Unit

All mailroom employees employed by Respondent at its Ironton, Ohio facility, excluding all other employees, and all professional employees, guards and supervisors as defined in the Act.

Pressroom Unit

All employees employed in the operation of Respondent's pressroom, including the camera, offset platemaking and all press operations, excluding all other employees, and all professional em-

ployees, guards and supervisors as defined in the Act.

IRONTON PUBLICATIONS, INC.

Liza Walker-McBride, Esq., and *Earl L. Ledford, Esq.*, for the General Counsel.
Bruce H. Henderson, Esq. and *Mark P. Reineke, Esq.*, of Nashville, Tennessee, for the Respondent.
Walter L. Martin, of Dayton, Ohio, for the Union.

DECISION

STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge. Upon charges filed[1] by Athens Printing Pressmen and Assistants Union No. 269–M, affiliated with Graphic Communications International Union, AFL–CIO–CLC (the Union), the Regional Director, Region 9, National Labor Relations Board (the Board) issued five consolidated complaints,[2] alleging that Ironton Publications, Inc. (the Respondent) committed certain violations of Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act, as amended (the Act). The Respondent filed timely answers denying that it had committed any violation of the Act.

A hearing was held in Huntington, West Virginia, on July 12 through 15, 1994, at which all parties were given a full opportunity to participate, to examine and cross-examine witnesses and to present other evidence and argument. Briefs submitted on behalf of the General Counsel and the Respondent have been given due consideration. Upon the entire record and from my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

At all times material, the Respondent was a corporation engaged in the publication, circulation, and distribution of a newspaper, The Ironton Tribune, in the Ironton, Ohio area.

During the 12-month period preceding May 1994, the Respondent, in conducting its operations, derived gross revenues in excess of $200,000, held membership in and subscribed to various interstate news services, including The Associated Press, published various nationally syndicated features and advertised various nationally sold products and services. The Respondent admits, and I find, that at all times material it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] Charges and amended charges in these cases were filed on the following dates: Case 9–CA–30992 on August 5, 1993; Case 9–CA–31030 on August 17, 1993; Case 9–CA–31148 on September 23, 1993; Case 9–CA–31236 on October 20 and December 29, 1993; Case 9–CA–31358 on November 24, 1993; Case 9–CA–31447 on December 29, 1993; Case 9–CA–31517 on January 26, 1994; Case 9–CA–31686 on March 17, 1994; Case 9–CA–31805–1 on April 20, 1994; and Case 9–CA–31805–2 on April 25, 1994.

[2] These consolidated complaints were issued on September 17 and October 22, 1993, and on January 13, March 11, and May 16, 1994, respectively.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits, and I find, that at all times material the Union was a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The unfair labor practices alleged in this matter involve two departments of the Respondent's newspaper publishing plant in Ironton, Ohio, the pressroom and the mailroom. Since 1963 the Union has been the designated exclusive collective-bargaining representative of the Respondent's employees in the pressroom unit, consisting of:

> All employees employed in the operation of the pressroom, including the camera, offset platemaking and all press operations, excluding all other employees, and all professional employees, guards and supervisors as defined in the Act.

There have been a series of collective-bargaining agreements covering this unit, the most recent of which expired on May 7, 1993.[3] On July 1, 1993, the Respondent voluntarily recognized the Union as the bargaining representative of its mailroom employees, but the scope of that unit is in dispute. Although the parties have engaged in negotiations, no agreement has been reached.

On May 12, 1994, the Board entered its decision in *Ironton Publications, Inc.*, 313 NLRB 1208 (*Ironton Publications I*), affirming the findings and conclusions in the decision of Administrative Law Judge Martin J. Linsky, entered October 13, 1993, which found that the Respondent had engaged in numerous violations of Section 8(a)(1), (3), and (5) of the Act.

B. *Section 8(a)(1), (3), and (4) Allegations*

1. Pressroom

a. *Extra pay and staffing issues*

The evidence, including the findings in Ironton Publications I, establishes that for many years there have been three employees working full time in the pressroom, a foreman, an assistant foreman, and a pressman. The latter two positions were included in the pressroom bargaining unit. As of May 1990, Greg Gilmore was the foreman, Joe Gann was assistant foreman, and James Jenkins was the pressman. Several of the unfair labor practices found in *Ironton Publications I* involved discriminatory actions the Respondent took with respect to James Jenkins after it learned, in November 1992, that he had joined the Union. James Jenkins' brother Roger worked as an employee in the mailroom for about 7 years and often worked in the pressroom when someone was out

[3] Union representative Walter Martin testified that because it felt the company was not applying the contract to all pressroom employees, the Union decided to withhold bargaining for a new contract until all Board litigation was resolved. In addition to the present case, the General Counsel instituted a 10(j) proceeding against the Respondent in the United States District Court for the Southern District of Ohio which is now on appeal to the Sixth Circuit Court of Appeals.

or there was a need for extra help. In October 1992, when Gann reduced his hours prior to retiring, Roger's hours in the pressroom increased. By November, he was working there 40 hours a week and was told that he would replace Gann as a full-time pressman. Roger's removal from the pressroom in January 1993 was found to be a violation of Section 8(a)(1) and (3) in *Ironton Publications I.* In March 1993, the Respondent hired Jack Day, designated him as assistant foreman of the pressroom, and took the position that he was a supervisor and not a member of the pressroom bargaining unit. The Board found in Ironton Publications I that Day was not a supervisor and among the affirmative action which the Respondent was ordered to take was that it promote James Jenkins to assistant foreman and transfer Roger Jenkins to a full-time position in the pressroom. The Respondent did not promote James Jenkins as ordered but, on occasion, he has performed the duties of the assistant foreman in Day's absence.

On July 30, 1993, foreman Gilmore was on vacation and James Jenkins had called in sick. That morning, Jenkins was called by business office manager Andrea Hopkins and asked to come in to run the press when Day was taken to the hospital after suffering an apparent heart attack. He arrived at the pressroom at about 11:30 a.m. and went about getting the newspaper out. Jenkins testified that he asked Hopkins to send Roger Jenkins to the pressroom to assist him but she did not do so. Mark Fields, the assistant foreman of the mailroom, who had some pressroom experience, assisted him for most of the day but left after the last press run was started. In addition to getting the paper printed, Jenkins was asked to make out the press reports and assist Hopkins with the inventory that are usually done by the pressroom foreman or, in his absence, the assistant foreman. He was not given any additional compensation for that day. Jenkins testified that when Fields left that day he was alone in the pressroom which is unusual and potentially dangerous.

The complaint alleges that the Respondent unlawfully discriminated against James Jenkins on July 30 because of his union and other protected activity by failing to pay him extra compensation for performing the duties of the assistant foreman and by failing to adequately staff the pressroom, thereby, creating dangerous and onerous working conditions.

ANALYSIS AND CONCLUSIONS

In cases where the employer's motivation for taking certain actions is in issue, those actions must be analyzed in accordance with the test outlined by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once that has been done, the burden shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of protected activity on the part of its employees.

I find that the General Counsel has not made a prima facie showing on these allegations. While there is clear evidence of the Respondent's union animus in the record, including, the findings in *Ironton Publications I* and the numerous violations of the Act found in this decision, infra, there is nothing to connect that animus to these events. The evidence relied on by the General Counsel does not establish that the Respondent had an established practice of providing extra daily compensation to anyone who filled in for the assistant foreman in the pressroom on a temporary basis. Gann testified that for the several years that he was assistant foreman, he received an additional $25 a week pursuant to an agreement with the publisher. There was evidence that he received this amount every week, even when he was off work for one or more days because of illness or vacation. The other evidence relied on is James Jenkins' testimony that he was paid $5 for each day that he served as assistant foreman when he worked in the mailroom. But Jenkins testified that he had no knowledge of anyone ever receiving extra compensation for serving a assistant foreman in the pressroom on a temporary basis and that no one representing the Respondent ever told him he would receive it. There is no evidence that the Respondent ever made a decision to deny Jenkins extra compensation for the duties he performed on July 30 let alone to establish that it was motivated by union animus. The evidence fails to establish the past practice counsel for the General Counsel contend was not followed in this instance and while they argue that Jenkins' ''request for extra compensation fell on deaf ears,'' there is no evidence that Jenkins ever made such a request. In the absence of an established past practice or a request by Jenkins for additional compensation, I am unable to conclude that Jenkins was entitled to such compensation or that the Respondent violated the Act by failing to provide it.

In support of the contention that the Respondent failed to provide adequate staffing in the pressroom on and after July 30, counsel for the General Counsel contend that the evidence shows that contrary to past practice the Respondent has refused to provide or to allow additional help to the pressroom when it was needed since shortly after the record closed in Ironton Publications I. Considering the specific events of July 30, I find no evidence of discriminatory conduct. James Jenkins was scheduled to work that day and called in sick. When a medical emergency left the Respondent without a regular pressroom employee available, Jenkins agreed to come in and put the newspaper out. He was assisted for most of the day by Fields, a mailroom employee with some pressroom experience.[4] While it appears that Fields left approximately an hour and a half before Jenkins' quitting time, it was not until after the last press run had been started. There is no evidence that Jenkins needed or asked for additional help at that point. I do not doubt Jenkins' testimony that it can be dangerous to be alone in the pressroom, but I do not believe the evidence as a whole supports the inference that the Respondent took advantage of this emergency situation in order to discriminate against Jenkins for engaging in protected activity. I also find that there is insufficient evidence to establish that the Respondent has altered a past practice by ceasing to assign additional employees to assist in the pressroom when needed. I shall recommend that both of these allegations be dismissed.

[4] Although James Jenkins testified that he asked that Roger Jenkins be assigned to assist him, the evidence does not establish that Fields' assistance was inadequate, why Roger was not assigned, or if he was even available.

b. *Layoff and recall of James Jenkins*

In September 1993, pursuant to an order of the District Court in the 10(j) proceeding, the Respondent reinstated Roger Jenkins to a full-time position in the pressroom. On September 22, James Jenkins was laid off. According to the Respondent, the reinstatement of Roger Jenkins meant there were four pressroom employees, but the normal complement was three and a fourth was not needed. Pursuant to an agreement, dated October 4, 1993, between James Jenkins, the Respondent and the Union, James, without waiving any discrimination claims, was recalled to the mailroom on a full-time basis and paid at the wage rate he had been receiving in the pressroom. In *Ironton Publications I*, the judge found that the Respondent discriminated against James by not appointing him assistant pressroom foreman and against Roger by removing him from the pressroom. The instant complaint alleges that it again discriminated against James by laying him off and failing to recall him to the pressroom after Roger was reinstated.

ANALYSIS AND CONCLUSIONS

I find there is ample evidence of the Respondent's union animus and that the evidence supports the inference that James was laid off because of his and other employees' union and protected activity that led to the Board's decision in Ironton Publications I and their participation in the proceedings that led to that decision. After first ignoring the Board's order, the Respondent cynically responded to the District Court's action to partially remedy the discrimination against Roger by discriminating against another Union supporter, his brother James. Its actions constituted a continuation of the discrimination found by the Board in *Ironton Publications I*, which involved its unlawful failure to promote James Jenkins to the assistant foreman position because he had joined the Union and its placing Day in that position.

Although it appears that three full-time employees (foreman, assistant foreman, and pressman) has long been and is the appropriate pressroom complement, I find that the Respondent's alleged justification for laying off James Jenkins, that it has an absolute right to select its supervisors and it has selected Day as assistant foreman, amounts to a pretext.[5] The Board found in *Ironton Publications I* that the assistant foreman position occupied by Day is not supervisory and had not been during the more than 25 years that Gann had held it. There is no evidence that duties of the position have changed or that the Respondent has ever bargained with the Union about removing it from the bargaining unit. Moreover, the Respondent's failure to comply with the Board's order to promote James Jenkins to the assistant foreman position should preclude reliance on this as justification for its action in any event. I find that the Respondent has failed to establish that it would have taken the same action in laying off James Jenkins and failing to recall him to the pressroom in the absence of protected activity by its employees and resort to the processes of the Board and that its actions violated Section 8(a)(1), (3), and (4) of the Act.[6]

c. *The police investigation*

On the afternoon of Saturday, October 9, 1993, after the press was started to run the Sunday newspaper, a malfunction occurred which caused ink to spray all over the press and the pressroom, stopping the press run and delaying its completion while the press was cleaned up. Publisher Jennifer Allen testified that she was called at home and told of the incident by pressroom foreman Greg Gilmore. Gilmore said that he believed it was caused by someone tampering with the press. After Allen arrived at the plant, observed the damage in the pressroom, which she estimated caused a loss of in excess of $1000, and talked further with Gilmore and the foreman of the mailroom, she concluded that there had been deliberate tampering with the press and called the Ironton Police. After a preliminary visit to the plant by police that evening, the investigation was assigned to Detective Sergeant Christopher Bowman. On the following Monday, Bowman came to the plant and talked with Allen and mailroom foreman Gary Creger. Bowman testified that he requested and was given the names of the employees who had been working in the pressroom and the adjacent mailroom on Friday afternoon and Saturday. He subsequently called Allen and asked that the employees on the list come to his office to be interviewed during their regular working hours. Allen gave the names and the interview times to Gilmore and Creger to be passed on to the employees who were to be interviewed. The complaint alleges that the Respondent violated the Act by compelling certain specified employees to participate in a police investigation which it initiated.

ANALYSIS AND CONCLUSIONS

Although counsel for the General Counsel contend that the Respondent used a routine malfunction of the press as an excuse to harass employees of the pressroom and the mailroom by subjecting them to involvement in a police investigation, I find that the evidence does not establish a prima facie case of discrimination arising from this incident. I find that the credible testimony of Allen establishes that she had a reasonable belief that the press had been deliberately tampered with, which resulted in a substantial delay in completing the press run and caused a significant monetary loss to the Respondent, and that she reported the incident to the police. There is no evidence that the Respondent accused any specific individual of causing the damage or determined who the police should interview. The credible testimony of Sergeant Bowman was that he requested that those employees who had access to the pressroom prior to the incident be made available for questioning and that he attempted to schedule their interviews during worktime for their convenience. While Roger Jenkins testified that he asked Gilmore if he could have a union representative with him at the interview and was told that Allen said it was not a union matter, I do not believe that establishes a violation of the Act. I also do not believe that Gilmore's telling Roger that he ''had to go down to the police station'' to meet with Bowman estab-

[5] The Wright Line analysis is required in pretext cases. *Bridgeway Oldsmobile*, 281 NLRB 1246, fn. 2 (1986); *Jefferson Electric Co.*, 271 NLRB 1089, 1090 (1984).

[6] The fact that he was recalled to the mailroom and the Respondent has offered to treat him as a member of the pressroom unit for bargaining purposes does not serve to undo these unlawful actions.

lishes that the Respondent compelled Roger or other employees to attend these interviews or that it did anything beyond conveying the message that Bowman wanted to interview them. I shall recommend that this allegation be dismissed.

d. *Disciplinary reprimand to Roger Jenkins*

On November 11, 1993, Allen issued a written reprimand to Roger Jenkins for allegedly making critical remarks to a supervisor concerning press maintenance on November 6, on November 10 leaving his post during a critical point at the beginning of a press run, kicking a pallet jack into a new garage door causing a dent in the door and using a forklift without permission. The complaint alleges that this reprimand was in retaliation for his union and protected activities.

Roger Jenkins testified that he was shown the reprimand by Allen and told to read it. The first incident mentioned is his allegedly telling Day that removing glaze from press blankets was a waste of time and it was enough to just get the paper printed. He said that he and other pressroom employees routinely wash off ink that has built up on the blankets and that he had no recollection of the incident. When he tried to talk to Allen about it, she said the incident had been reported to her by mailroom foreman Creger. Roger testified that on the morning of November 10, as the press run was starting, he had to go to the bathroom and told Day that he would be right back. Day asked him to hold off a few minutes and he did so, but eventually could not wait any longer and told Day he had to go. As he left, he told foreman Gilmore that he would be right back and he returned a short time later. After the press run was completed, Day told Roger that the reason he asked him not to leave was that he was trying to train him on the press. Roger said that he was aware of no rule restricting bathroom use and that he had never had to request permission to do so. He testified that when he spoke to Allen about the incident she would not listen to what he had to say. He testified that he had found the pallet jack parked in the aisle next to the press that he and Day had to use to check on the press and that he had moved it into the mailroom and left it by the garage door. He did not kick it and did not recall that it had run into the door. No one spoke to him at the time he moved the pallet jack. He testified that there are battery-operated lifts in both the pressroom and the mailroom and that the one in the pressroom was being recharged that day. He went into the mailroom and used the forklift that was there to move three rolls of paper without first asking permission to do so. He testified that he had used the forklift before while working in the pressroom and that he has never asked for permission to do so. No one said anything to him about using the forklift at the time.

Greg Gilmore testified that, on November 9, he attended a meeting with Allen, Day, and Creger in which Allen said that there was a problem with some comments that Roger Jenkins had made on November 6. She also said that the supervisors could write up the pressroom employees ''for anything, didn't matter what.'' On November 10, he saw Roger leave to go to the restroom for a few minutes as the press was starting up. He said that after Roger returned he heard him and Day arguing and that later Day asked him to have a meeting about Roger leaving his post. He agreed, but before he could do so, mailroom foreman Creger reported the incident to Allen. Gilmore said that there was no policy concerning bathroom use and that permission was not required. He testified that there is a forklift, a roll mover, and a pallet jack available to the pressroom and the mailroom and they are not assigned to a particular department. He said that the forklift is used more often by the mailroom but that he had used the forklift before, that he had never asked permission to do so, and that there was no rule or policy requiring the obtaining of permission to use it. Gilmore testified that he first learned of the pallet jack and the forklift incidents in a meeting with Allen, Day and Creger in which he was shown the reprimand to Roger Jenkins and that no one had previously talked to him about either. He also testified that during that meeting he told Allen that he was aware of the dispute between Jenkins and Day over Jenkins going to the bathroom, that he was going to meet with them later in the day after they cooled down, and that he did not consider it a big problem. Allen responded that ''it was a big problem'' and what was wrong there was that ''the Jenkinses think that they can run this place.''

Creger testified that, on November 10, while in the mailroom, he saw Roger Jenkins, who looked ''real huffy puffy,'' come in to get the forklift and the pallet jack was in the way. Instead of pulling it out of the way, he kicked the pallet jack into the garage door causing a rip in its insulation and denting it. He asked Roger if there was a problem, but he did not respond and drove away on the forklift. He went to Gilmore and asked if Roger had a problem and Gilmore said that Roger and Day had been arguing and he had to separate them. Creger testified that he told Gilmore what he had seen Roger do with the pallet jack, but because he didn't think Gilmore would say anything about it, he went to Allen and reported the incident.

Jennifer Allen, who issued the reprimand to Roger Jenkins, testified that she was informed by Day, on November 6, that Roger had made uncomplimentary remarks about maintaining the press and had said just getting the paper printed was good enough. She asked Gilmore about it but he said he did not witness the incident. She said she talked to Roger about it ''later on,'' but she did not recall what he said. She said the November 10 bathroom incident was reported to her by Day and by Creger, who was in the mailroom and to whom it ''could have been easily audible from his area.'' She was told that at a critical point in the startup of the press, when they were trying to register color and Day was depending on his assistance, Roger, without saying anything, ''simply left the press area.'' Creger also reported the pallet jack and forklift incidents. He told her he saw Roger kick the pallet jack into the door, damaging it, and then got on the forklift and drove it to the pressroom without first asking permission. She said that the forklift is mailroom equipment and the customary practice is to ask permission from the mailroom foreman before using it. She said that she spoke with Day and Creger before issuing the reprimand, because they were ''immediately involved,'' but she did not recall if Gilmore was consulted. She testified that she felt a strong warning was required because there had been so many incidents within a short period of time. She called Roger in and read through the reprimand. She asked him if he had any questions and he did not.

ANALYSIS AND CONCLUSIONS

I find there is sufficient evidence to support the inference that this reprimand was issued to Roger Jenkins because of his and other employees' support for the Union and other protected activity. As noted, Roger was working in the pressroom in November 1993 as a direct result and only because of the litigation in *Ironton Publications I* and the 10(j) proceeding. The timing of an employer's action can be persuasive evidence of its motivation. *Limestone Apparel Corp*., 255 NLRB 722, 736 (1981). This reprimand was issued shortly after Roger returned to the pressroom in September 1993 pursuant to the District Court's order and within a month of the issuance of Judge Linsky's decision in *Ironton Publications I*, wherein he found that the Respondent considered Roger ''one of the primary union supporters'' and discriminated against him because of that support. The credible testimony of Gilmore establishes that, a few days before the reprimand, Roger, the only regular pressroom employee other than Day and Gilmore, had been singled out for disciplinary action by Allen who instructed supervisors in the pressroom and mailroom to write him up for ''anything.''

I find this indicates her concern was not so much Roger's performance as it was finding a basis for disciplining him and that her actions were consistent with this approach. After getting reports about these incidents, she prepared and issued the reprimand to Roger without informing him of his alleged misconduct or giving him the opportunity to explain his actions.[7] The Board has considered similar failures to provide employees with specific information concerning alleged misconduct and the opportunity to explain their actions to be significant factors in findings of discriminatory motivation. E.g., *Burger King Corp*., 279 NLRB 227, 239 (1986); *Syncro Corp*., 234 NLRB 550, 551 (1978).

I also find that the Respondent has not established that it would have taken the same action against Roger in the absence of protected activity. On the contrary, I find that much of the justification it has offered is pretextual. Allen testified that it was the combination of incidents within a short period of time that caused her to issue the ''strong'' reprimand. I find there is no credible evidence to establish that the first incident, involving allegedly disparaging comments by Roger about cleaning press blankets, ever occurred. The only evidence that it did is the testimony of Allen that she took action based on what Day told her about the incident. But Day, who at the time of the hearing was in the employ of the Respondent and allegedly considered by it to be a supervisor, was not called as a witness. There is no reason to believe that he would not be favorably disposed to it, nor any evidence that he was unavailable. This creates the inference, which I draw, that his testimony would not have supported the Respondent's position. *International Automated Machines*, 285 NLRB 1122, 1123 (1987). I do not credit Allen because she had no personal knowledge about the incident. Although she claimed her knowledge about the incident came from conversations with both Gilmore and Day, Gilmore credibly testified that he was not working on November 6 and was told about it by Allen after he returned to work three days later.

I find that the Respondent's reprimanding Roger for leaving the pressroom on November 11 to go to the bathroom also involves a pretext. In its post-hearing brief, it contends that Roger was properly disciplined for leaving the pressroom during the press startup because it created a dangerous situation. Even accepting as true that one person starting up the press alone can involve possible danger,[8] this argument amounts to a shifting explanation for its action and supports a finding of ''pretext.'' *Jennie-O Foods*, 301 NLRB 305, 321 (1991). The credible and uncontradicted testimony of Roger Jenkins was that Day told him he did not want him to leave the pressroom at that moment because Day was trying ''to train him'' on the press. As noted, Day was not called as a witness. A third distinct reason was offered by Allen, who issued the reprimand. According to her, neither safety nor training concerns were involved. She testified:

> At a critical point of startup in which we were trying to register color, Roger Jenkins left the press area, leaving Mr. Day alone at that moment. You know,—if Jack had been—*if Mr. Day had been doing that alone from the beginning that would have been fine*, but he was depending on Roger to perform certain tasks at that point. And, without permission, Roger Jenkins simply left the press area. [Emphasis added.]
>
> Here again, Allen was not present when the incident occurred and she allegedly relied on the hearsay statements of Day and the double hearsay statements of Creger, who also was not present nor even employed in the pressroom.[9] Not only did she not question Roger about what happened before deciding to reprimand him, she ignored the information and recommendation of the pressroom foreman that what occurred was not a problem and that he would deal with it when things cooled down. To Allen, it was ''a big problem'' because it involved one of the Jenkinses, several of whom were known supporters of the Union and were found to be discriminatees in *Ironton Publications I*. I do not credit Allen's testimony concerning this incident. She clearly attempted to imply that Creger had heard what was said between Roger and Day by claiming that it was ''audible'' in to him in the mailroom. Creger admitted that his knowledge of the incident came from Gilmore. I find that this part of the reprimand was pretextual. Roger's actions violated no rule and that the Respondent has not established that it would have been issued in the absence of protected activity on Roger Jenkins' part. *United Merchants*, 284 NLRB 135, 159–160 (1987).

I find the portion of the reprimand involving Roger's alleged unauthorized use of the forklift is also a pretext. Al-

[7] I do not find asking Allen's Roger if he had any questions after she read the reprimand to him afforded him an opportunity to explain his actions.

[8] There is no evidence that a dangerous situation was involved here. According to the credible and uncontradicted testimony of Roger, he informed both Day and Gilmore that he had to go to the bathroom before leaving. Gilmore was present in the pressroom, aware that Roger had to leave and available if Day needed assistance.

[9] Creger testified that he was told what happened in the pressroom that morning by Gilmore. However, his version, that Day and Jenkins ''had a few words'' and Gilmore ''had to separate them,'' differs markedly from the testimony of Roger and Gilmore as to what had transpired.

though Allen testified that the forklift belonged to the mailroom and there was ''a verbal policy'' during her tenure that permission must be asked to use another department's equipment, I do not credit her testimony. I credit the testimony of Roger and Gilmore, that it was common practice for pressroom to use the forklift when necessary and there was no need to obtain permission from the mailroom foreman to do so, over that of Creger that anyone who wanted to use the forklift asked his permission. Moreover, when Roger entered the mailroom that morning, Creger was present, spoke to him, and was aware that Roger was going to use the forklift. It is difficult to understand how Roger's use of the forklift could be considered unauthorized when Creger stood by while he took it without saying anything to him. I find the Respondent has failed to establish any legitimate basis for this portion of the reprimand.

The one part of the reprimand that does not appear to be a pure pretext is the dent in the garage door. The evidence shows that the door was relatively new and employees had been cautioned in a memo to avoid damaging it. I credit the testimony of Creger that there is a dent in the door and that it was caused by the pallet jack that Roger admits moving in the vicinity of the door that morning. In an affidavit Creger gave to the Respondent prior to the hearing, he stated that Roger kicked the pallet jack into the door ''intending to cause damage'' and it must be assumed that is what he told Allen when he reported the incident and what she relied on in making her decision to issue the reprimand. However, at the hearing he testified, ''I'm not saying he intentionally kicked it into the garage door'' and that, when he kicked it, ''he had no idea where it was going to go.'' Considering all of the circumstances, I find that the Respondent has not established that it would have issued a this reprimand to Roger Jenkins in the absence of protected activity. According to Allen, it was the combination of all of these incidents within a short period that led her to issue this ''strong'' reprimand. When the three pretextual reasons for the reprimand are excluded, there is a single minor incident involving a dent in the garage door which, from all that appears, was the result of an accident not an intentional effort to cause damage.[10] I find that the evidence as a whole establishes that the reprimand was the result of the Respondent's hostility toward the Jenkinses, arising from their protected activity, and its expressed intention to write them up for any reason in retaliation for that activity. Accordingly, I find that the issuance of the reprimand to Roger Jenkins on November 11, 1993, violated Section 8(a)(l), (3), and (4) of the Act. *Greensboro News & Record*, 290 NLRB 219, 224 (1988).

e. *Alleged reduction of benefits*

After being returned to the pressroom pursuant to the District Court's order, Roger Jenkins was not paid a Christmas bonus in 1993. In the previous year, he had received a week's pay as a bonus. When he asked Gilmore to check with Allen about the bonus, he was told to read his contract. Sometime later, Roger was also informed that he was no longer eligible to participate in the Respondent's profit-sharing plan and that his vacation was reduced from 3 weeks to 2 weeks. The complaint alleges that denying Roger these benefits was discriminatory. The Respondent's position is that the Christmas bonus and profit-sharing benefits apply only to employees who are not covered by the pressroom collective-bargaining agreement and that Roger is not eligible because that agreement does not provide them. Likewise, it contends that it has applied the terms of the agreement governing vacation to Roger and he is only entitled thereby to 2 weeks. The Respondent also contends that the allegations concerning the profit-sharing plan and vacation are barred by Section 10(b) of the Act.

Analysis and Conclusions

Section 10 (b) is not jurisdictional but is an affirmative defense which must be pleaded or litigated at the hearing or it is waived. *Christopher Street Corp*., 286 NLRB 253 (1987). The Respondent raised the Section 10(b) defense in its answer only with respect to the allegation concerning unilateral implementation of a new sick leave policy in April 1994. I find that it waived this defense by failing to plead it or litigate it with respect to the allegations concerning reduction of Roger Jenkins' benefits. It also failed to carry the burden of proving that the April 20, 1994 charge concerning these issues was filed more than 6 months after Roger had notice of the Respondent's action reducing these benefits.[11]

The evidence shows that the Respondent has done to Roger Jenkins the same thing that it had been found in *Ironton Publications I* to have unlawfully done to James Jenkins. It has selectively applied provisions of the pressroom collective- bargaining agreement, which provide for less vacation and do not provide for a Christmas bonus or participation in profit sharing, to the detriment of Roger, a union supporter and discriminatee in *Ironton Publications I*, while ignoring it in the case of the other pressroom bargaining unit member Jack Day who was not a member of the Union.[12] I find that its discrimination against Roger violated Section 8(a)(1), (3), and (4) of the Act.

f. *Requiring pressroom employees to empty trash cans*

The complaint alleges that the Respondent violated the Act by requiring pressroom employees to empty trash cans. Roger Jenkins testified that, in March 1994, he was informed by the Respondent's production manager Gilbert Hutchcraft that he was to start emptying the trash cans in the pressroom. He had not done so before while employed in the pressroom. Gilmore testified that, previously, the trash cans had been emptied by mailroom employees. The Respondent contends that it has always been the responsibility of the pressroom employees to empty these trash cans. It presented testimony from Samuel Turner, who had been pressroom foreman during parts of 1988 and 1989, that during his tenure he and

[10] There was testimony that the previous garage door was often accidentally run into and dented during the regular course of business. According to Creger, the new door was backed into by an employee on the forklift a couple of months before the hearing and there is no evidence that he was reprimanded.

[11] Roger Jenkins credibly testified that he was first informed that he would only get 2 weeks of vacation and that he was no longer participating in the profit-sharing plan in March and April 1994, respectively.

[12] The Board has already found that there is no merit to the Respondent's argument that Day is a statutory supervisor by virtue of his position as assistant foreman of the pressroom. *Ironton Publications, Inc*., supra, at fn. 2.

other pressroom employees emptied the trash cans themselves. Tom Rattenbury, who served as publisher from October 1985 through March 1989, testified that it was the responsibility of the pressroom employees to keep the pressroom clean and that included emptying the trash cans when necessary.

ANALYSIS AND CONCLUSIONS

The testimony of all of the witnesses who testified about this issue was credible. It appears that while pressroom employees may have once been responsible for emptying the pressroom trash cans, since early 1989, it has been the responsibilty of the mailroom employees. I find that after 5 years it had become an established practice that could not be unilaterally changed by the Respondent. Again, this issue is almost identical to that in *Ironton Publications I* where the Respondent was found to have unlawfully imposed the additional duty of mopping the pressroom floor on pressroom employees. Its imposition at about the same time as Roger Jenkins was subjected to a reduction in benefits creates the inference that it was meant to harass him and to retaliate for the Union's having challenged its previous unilateral change by filing a charge with the Board. I find that its action violated Section 8(a)(1), (3), and (4).

g. *Alleged denial of lunchbreaks*

The complaint alleges that on various occasions since March 1994 the Respondent has denied Roger Jenkins a lunch break. Roger testified that when there are three people working in the pressroom they get a lunch break, but if there are only two, most of the time they are so busy they do not get a lunch break. He testified that he gets a lunch break if he asks for one and does not get one if he fails to ask. The record contains ten time cards which show that on some days covered by those cards Roger did not clock out for a lunch break. Former pressroom foremen Gilmore and Turner both testified that in their experience there were times when they were unable to take a lunch break.

ANALYSIS AND CONCLUSIONS

I find that the evidence fails to establish a prima facie case that the Respondent denied Roger Jenkins the opportunity to take a lunch break in order to retaliate against him for engaging in protected activity. It appears that there were days when work demands in the pressroom resulted in the lunch break being delayed or missed entirely. Even when considered in the light of the other acts of discrimination to which Roger has been subjected, the fact that there were days when he did not take a lunch break or that his time cards show that he did not punch out for a lunch break on certain days does not establish that this was part of an effort to harass him. His testimony fails to describe a single instance in which he was denied a lunch break while another pressroom employee or supervisor took one or any in which he asked for a lunch break and was refused. I shall recommend that this allegation be dismissed.

2. The mailroom

a. *Statements by Gary Creger*

The complaint alleges that the Respondent violated Section 8(a)(1) on an unspecified date in September 1993 when mailroom foreman Gary Creger informed employees that they would not receive a pay raise because they were involved in union activities. Shawn Jenkins is a full-time employee in the mailroom. He testified that in September 1993 he was earning $4.25 per hour. After learning that another mailroom employee, Chris Strait, had been give a raise to $4.50 per hour, he went to Creger and asked for a raise. Creger said he would ask Jennifer Allen about it. The following day Creger told him that Allen had said, ''since you was in union activity, you have to bargain your raises out.'' James Jenkins testified that after he was reemployed in the mailroom in 1993, he asked Creger for a raise. Creger told him that because he belonged to the Union it was up to the Union to negotiate any raise. Creger testified that he recalled an incident in which both Shawn and James Jenkins asked him if he could get them a raise. He responded that it was out of his hands and was something that they would have to negotiate. He did not say with whom they would have to negotiate and he did not say that they could not get a raise because they were involved in union activity.

ANALYSIS AND CONCLUSIONS

In this instance, I credit the testimony of Creger. He appeared to have the best recollection of the conversation and described the setting and what was said in detail. James Jenkins had no specific recollection of when the conversation occurred and did not mention Shawn being present. Shawn appeared to be confused about the incident and I believe he was giving his interpretation of what Creger said rather than a verbatim account. I find that the evidence fails to establish the complaint allegation that Creger told the employees that they would not receive a pay raise because they were involved in union activities. The incident occurred after the Union had been recognized as the bargaining representative of the mailroom employees and negotiations for a contract had commenced and were in progress. Creger's statement that he could not give them a raise and that any raise would have to be negotiated was not coercive and did not threaten retaliation against the employees for engaging in protected activity. I shall recommend that this allegation be dismissed.

b. *Changes in the assistant foreman's duties*

For about 7 years prior to July 1993, Roger Jenkins was employed in the mailroom, the last three as assistant foreman. Earlier that year he had declined an offer to become the mailroom foreman. On July 13, circulation manager Sherry Beckman showed him a document purporting to be a job description for the assistant foreman position. She said that some changes had been made and he would be required to perform the duties listed. He asked if he could have a couple of days to think about whether he wanted to remain as assistant foreman under the new description, but Beckman said he had to accept or decline that same day. Roger de-

clined to continue in the position under the new job description. The complaint alleges that the Respondent unlawfully revised the duties of the assistant foreman in the mailroom in order to make them more onerous and to force Roger to give them up. The Respondent contends that the written job description presented to Roger effected no substantive change in the assistant foreman's duties and that the position is supervisory within the meaning of Section 2(11) of the Act.

ANALYSIS AND CONCLUSIONS

While the Respondent contends that the job description merely restated the duties Roger was already performing, it is clear that the requirement that, on a rotating basis with the foreman, he would have to spend all of Saturday night in the mailroom as well as performing Sunday morning responsibilities, was a change from previous practice. Moreover, the job description, as written, arguably vested the assistant foreman position with a number of supervisory duties. I find this also was a significant change as the evidence does not establish that Roger was a statutory supervisor when he held the position.

Contrary to the argument of the Respondent, it is well settled that the burden of establishing supervisory status is on the party alleging that it exists. *Soil Engineering Co.*, 269 NLRB 55 (1984); *RAHCO, Inc*., 265 NLRB 235, 247 (1982). In making determinations concerning such status, it is important not to construe it too broadly lest an employee be denied rights which the Act is intended to protect. *Chicago Metallic Corp*., 273 NLRB 1677, 1689 (1985); *Williamson Piggly Wiggly v. NLRB*, 827 F.2d 1098, 1100 (6th Cir. 1987). Possession of any of the indicia listed in Section 2(11) is sufficient to place an individual within the statutory definition. *Ohio River Co*., 303 NLRB 696, 717 (1991); *Opelika Foundry*, 281 NLRB 897, 899 (1986). However, when the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will not find such authority based on those indicia. *The Door*, 297 NLRB 601 fn. 5 (1990).

I find that the Respondent has not established that this position was supervisory. At the outset it must be noted that Roger was found to be a discriminatee in *Ironton Publications I*, in part as the result of unlawful actions taken against him while in the same position in the mailroom. One of these actions involved denying him the $5 per day extra compensation he was to receive when he filled in for the foreman. While not conclusive, the Respondent's failure to raise his alleged supervisory status as a defense indicates that it did not consider him to have it. Roger testified that he routinely performed the same duties as other mailroom employees. The fact that he received additional pay only in the absence of the foreman indicates that he possessed no residual supervisory authority. Such sporadic and infrequent possession of supervisory authority is to be distinguished from its constant possession but infrequent exercise. The latter indicates supervisory staus while the former does not. *Kern Council Services*, 259 NLRB 817, 818 (1981).

The Respondent concedes that Roger did not have the power to hire or fire but contends that because he filled in for the foreman in his absence, attended management meetings, disciplined employees, determined if additional help was needed, assigned work, scheduled employees and authorized employees to leave for lunch, he was a statutory supervisor. Roger testified that he had attended management meetings on a couple occasions when the mailroom foreman was not present and Allen directed him to attend. There is no evidence as to what these meetings involved or to establish he was there for any reason other than to substitute for the foreman. Such limited attendance is not enough to establish supervisory status. *Auto West Toyota*, 284 NLRB 659, 661 (1987). From all that appears, the work in the mailroom is routine, repetitive and requires little direction. I find that Roger's telling employees to empty trash cans or that they could go to lunch if the workload permitted were routine and ministerial actions and do not involve the kind of responsible direction using independent judgment that is contemplated by the definition of supervisor in the Act. *Quadrex Environmental Co*., 308 NLRB 101 (1992); *Esco Corp*., 298 NLRB 837, 839 (1990). It is noteworthy that the Respondent offered little in the way of specific evidence to establish that it conferred supervisory responsibilities on Roger before the job description was prepared. It presented no documentary evidence that Roger had disciplined anyone or that he had made out or changed work schedules for the mailroom. I find the conclusory testimony of Beckman that Roger exercised the same duties as the foreman except to hire and fire, without any supporting evidence, is insufficient to establish that he did so. *Sears, Roebuck & Co*., 304 NLRB 193, 199 (1991). Its evidence that Roger could assign jobs and discipline mailroom employees, consisting of statements Roger allegedly made to Creger describing his duties as assistant foreman, was contradicted by Roger's credible testimony at the hearing. I do not believe that the statements in affidavits Roger gave the Board, cited by the Respondent, discredit his testimony or indicate that he regularly exercised supervisory authority. They indicate only that, during the three years time he was assistant foreman, he had done ''some or most of the duties listed'' in the job description he was shown. This is consistent with the evidence showing that he filled in for the foreman on occasion. They do not establish that such substitutions occurred with sufficient regularity or to such an extent as to warrant a finding that he was a statutory supervisor. *Mack's Supermarkets*, 288 NLRB 1082, 1087–1088 (1988); *Latas De Alumino Reynolds*, 276 NLRB 1313 (1985). Finally, the Respondent contends that, if the assistant foreman was not a supervisor, the mailroom would have been without supervision during busy production times, a prospect it contends is ''absurd.'' However, its business manager Andrea Hopkins testified that, at the time of the hearing in this case, there was no assistant foreman in the mailroom. I find the evidence fails to establish that Roger was a supervisor when he was assistant foreman of the mailroom.

The foregoing finding necessarily discredits the Respondent's claim that the job description Roger was given was merely a restatement in written form of the duties he was already performing as assistant foreman. When the stated reason for the Respondent's action is false, another motive may be inferred from the facts in the record as a whole. *Shattuck Denn Mining Corp. v. NLRB*, 363 F.2d 466, 470 (9th Cir. 1966). The job description was issued shortly after the hearing in *Ironton Publications I* concluded and only weeks after the Union's request for recognition as the bargaining representative of the mailroom employees. Roger was an identi-

fied supporter of the Union and an alleged discriminatee in *Ironton Publications I.* I find that whether the Respondent was attempting to use the new job description to retaliate against Roger for his union support and/or to force him out of the position by imposing a new and more onerous duty on him (in the case of having to work Saturday nights on a rotating basis)[13] or was seeking to neutralize that support by making the position supervisory,[14] its action was unlawful and violated Section 8(a)(1), (3), and (4) of the Act.

c. *Disciplinary reprimands*

1. Shawn Jenkins

The complaint alleges that disciplinary warnings issued to Shawn Jenkins on June 22 and July 13, 1993, and on January 11, 1994,[15] were in retaliation for protected activity.

A. *June 22, 1993*

The first warning resulted from his use of profanity on the loading dock in the presence of a youth carrier, a 13-year old girl, who was there with her father to pick up newspapers for delivery. Shawn testified that while he was bringing newspapers to the dock to be picked up by carriers, one named Tom Harding asked, ''Is this all my papers?'' Shawn said he hoped so and Harding responded, ''Well, it better be or its your fucking fault.'' Shawn responded, ''No, it ain't my fucking fault.'' The following day he was issued a written reprimand by Beckman, who testified that the girl's father complained to her about Shawn's language and she had him put the complaint in writing. She was not present when the incident occurred and relied on the father's complaint. When she asked Shawn about it, he admitted using the profanity and she determined that a reprimand was necessary because such language should not have been used with a child present.

ANALYSIS AND CONCLUSIONS

I find there is sufficient evidence to make out a prima facie case that this reprimand was the result of the Respondent's union animus. It was issued to a known supporter of the Union within a few days of the conclusion of the hearing in Ironton Publications I, which involved an allegation of discriminatory disciplinary action against Shawn Jenkins. I also find that the Respondent has not established that it would have taken the same action even in the absence of protected activity. There was evidence that profanity was not unusual if not commonplace in the mailroom and on the loading dock and was admittedly tolerated by the Respondent's supervisors Creger and Beckman for whom Shawn worked. This was not a situation where the profanity was directed at the youth carrier but one in which she happened to be present and overhear a verbal altercation between two adults. The uncontradicted testimony of Shawn was that he was responding in kind to profanity directed at him. The Respondent was on notice that profanity was being used on the loading dock, which was accessible to its carriers and to some extent the public, yet it took no action to prevent such an unfortunate but foreseeable incident until a known supporter of the Union was accused of such use within earshot of a youth carrier. The fact that the carrier and her father were upset was as much a result of the Respondent's condonation of the use of such language as Shawn's uttering the words. I find that singling him out for disciplinary action under these circumstances was discriminatory and violated Section 8(a)(1), (3), and (4).

B. *July 13, 1993.*

On July 13, Shawn was issued a written reprimand by Creger. The reprimand is titled, ''Unauthorized Departure From Job'' and states that it was issued for his clocking out and leaving the premises prior to the end of his shift without permission from the department head. Shawn testified that when his work was caught up that day he clocked out and went to lunch. As he was leaving, he told assistant foreman Roger Jenkins that he was going to lunch and Roger asked him to drop off a set of keys at his house. He did so and returned within a half-hour. He testified that he had often gone out to lunch previously without obtaining anyone's permission and nothing was ever said about it. Later that afternoon, he was called in by Creger and Beckman who asked him where he had gone and he told them he had gone to lunch. They told him that he needed permission to do so and gave him the reprimand. Creger testified that he had no recollection of giving this reprimand although it contains his signature. However, he testified that since he has been mailroom foreman he has required employees who are going to leave the building for lunch to ask him and clock out.

ANALYSIS AND CONCLUSIONS

The testimony of Shawn Jenkins concerning this incident was credible and uncontradicted. I find that the evidence establishes a prima facie case that this reprimand was issued in retaliation for his engaging in protected activity. I also find that the Respondent has not established that it would have been issued in the absence of such activity. The reprimand states that Shawn clocked out and left the building before the end of his shift and implies that he was supposed to be working. His credible testimony was that he was taking a lunch break to which he was entitled and that he did all that he was required to do when he clocked out and informed the assistant foreman that he was leaving. Creger had no specific explanation as to how this constituted a violation or why the reprimand was issued, but claimed that he had to give permission before a mailroom employee could go to lunch. This was contradicted by the testimony of Beckman, Creger's superior at the time, that all a mailroom employee was required to do was get the approval of the assistant foreman. I find this reprimand was pretextual and violated Section 8(a)(1), (3), and (4).

C. *January 12, 1994*

On January 12, 1994, Shawn Jenkins was given a written warning and placed on probation for 60 days for allegedly

[13] This resulted in Roger no longer receiving additional pay when he filled in for the foreman of the mailroom.

[14] Certain of the language used in the job description suggests it was prepared with an eye toward using it to exclude the position from the mailroom bargaining unit, viz., ''[Y]ou need to determine whether or not you wish to continue in your current management role.''

[15] The documents memorializing the first and third warnings are dated June 23, 1993, and January 12, 1994, respectively.

missing 3 days work without proper notification to his supervisor. Shawn testified that on a Wednesday he received a call from Creger at his home which is 20 miles outside of town. There had been a severe ice storm and Creger was calling to ask if he would be able to get to work. Shawn told him there was no way he could get in and Creger said that he would see him tomorrow. That evening while pushing a vehicle, Shawn slipped and sprained his ankle. He was to report to work at 6 a.m. on Thursday morning. When he called in to say he was unable to work that morning Creger was not there and he spoke to Jack Day. Day said he would pass the word for him and he heard nothing more that day. On the next day, his companion called in for him. Again, Creger was not present and she gave the message that he was unable to work because of his ankle injury to someone in the office. Shawn called again on Saturday morning and was told by someone in the office that he had to contact Creger at his home and gave him the number. He called Creger at his home and told him he could not work that day because of his ankle but would be in on Tuesday, his next scheduled workday, no matter what. After beginning work on Tuesday, he was taken into the office of marketing director Tony Morris by Creger. When he entered, he asked if he was being reprimanded and Morris said he just wanted to talk to him. Morris asked why he had not spoken to Creger personally about not coming in. When Creger informed him that Shawn had called him on Saturday, Morris said that he had not done so on the other days. He also said that Shawn had not brought in a doctor's excuse. When Shawn said he could do so, Morris began talking about the Company's sick leave policy and read the policy in the employee handbook which says, inter alia: ''Department heads may require a doctor's excuse for any illness that requires time off from work.'' Morris then told him he was being put on probation.

Gary Creger testified that on Tuesday, because of the inclement weather, he called Shawn at home to see if he would be in the following morning and was told the he would try to be there. He told Shawn to call if he could not make it but he did not call and did not show up. On Wednesday afternoon, he called Shawn's home and spoke with his companion who said the weather was bad and she didn't know if Shawn could make it in the next morning. He told her to have Shawn call when he got back. Shawn did not call and did not show up for work in the morning. At 6:15 a.m. on Thursday morning, Roger Jenkins told him that Shawn had hurt his ankle and would not be in on Thursday and possibly not on Friday. On Friday, he was informed that Shawn had called in at 8:30 a.m. and left a message that he would not be in. Creger said that he was in the building at 7:30 a.m. that morning. On Saturday, Shawn called him at home to say that his ankle was still hurting and he would not be in. He testified that he had discussed the handbook provisions concerning absenteeism and tardiness with mailroom employees at meetings in July and December 1993.

Tony Morris testified that he was serving as acting publisher in the absence of Allen who was away and learned that Shawn was not at work. When he returned the following Tuesday he was called in for a fact-finding meeting. Morris read him the company policy about following proper channels if he was unable to come to work. He asked Shawn if he had a doctor's excuse and he said he did not but could get one. Morris testified that he was not concerned with determining ''whether or not his absence was justified,'' but wanted to stress the proper way of notifying his supervisor if he was not going to be at work. He informed Shawn that he was to be placed on 60 days probation and confirmed it the next day in writing at Shawn's request. He said he had discussed the matter with Allen by telephone and they decided probation was the best of several options they had. On cross-examination Morris stated that it was his understanding that Shawn had called in while Creger was present at the newspaper but had just left him a message rather than talking to him.

ANALYSIS AND CONCLUSIONS

I find there is sufficient evidence to support the inference that this warning was issued to Shawn Jenkins in retaliation for engaging in protected activity. I also find that the Respondent has not established that it would have taken the same action in the absence of protected activity. If the testimony of Creger were credited, it would establish far more than a debatable failure to comply with the employee handbook provisions concerning absence and tardiness. According to Creger, Shawn had not merely failed to comply with the handbook provisions but had deliberately ignored his specific instructions that Shawn call him to confirm whether he would be in, on Wednesday and again on Thursday. Although he had allegedly ignored Creger's instructions to call in on Wednesday morning and had not come in, leaving the mailroom understaffed, Creger merely left him a message on Wednesday to call him about Thursday. I did not believe him. The testimony of Morris, the management official who issued the disciplinary warning, fails to corroborate Creger's testimony and is consistent with the credible testimony of Shawn as to what actually happened. Morris said nothing about any failure on Shawn's part to give notice of his inability to get to work in either the written warning or his testimony.

Although the written warning implies that it was based in part on Shawn's failure to work as scheduled, there is nothing to suggest it had any reason to doubt that he was unable get to work on Wednesday because of the weather. On the contrary, the evidence shows that Creger anticipated that possibility when he called Shawn on Tuesday and was told that he would not be able to make it. Likewise, there is no evidence it questioned that he had injured his ankle. While at the January 11 meeting there was some discussion of Shawn's not having brought in a doctor's excuse, when he offered to get one, Morris did not press it and he said he was not concerned with ''whether or not his absence was justified,'' only whether he properly notified his supervisor. Thus, the sole basis for the reprimand was Shawn's failure to talk to Creger personally about his inability to get to work on Thursday and Friday. I find the Respondent has not shown Shawn violated its policy concerning absence notification. The employee handbook states: ''If you must be out because of illness or some other reasonable cause, you should notify your department head as soon as possible.'' There is no requirement that the employee speak to the department head personally.[16] In this case, that was impossible since

[16] It appears that in addition to being mistaken about Shawn just leaving a message for Creger when he was in the building, Morris was also was mistaken about the Respondent's policy, which he tes-

Creger was not available on either Thursday and Friday when Shawn and his companion called in.[17] This incident also stands in stark contrast to two others, credibly described by former pressroom foreman Gilmore, involving Jack Day, a nonsupporter of the Union, who failed to show up for work or to call in. In one instance, Gilmore called him at his home and was told he was sick. In the other, Gilmore had to go to Day's home to find out he was unable to work due to illness. In neither case was Day reprimanded. I find that the Respondent's warning and placing Shawn on probation was in retaliation for his protected activity and violated Section 8(a)(1), (3), and (4).

d. *Failure to grant paid sick leave*

Following his return to work after his ankle injury, Shawn Jenkins asked his foreman if he would be paid for the days he had missed due to the injury under the Respondent's sick leave policy. Creger told him he would not be paid but gave him no explanation. Shawn testified that in 1992, his first year as a full-time employee, he had been paid for days that he was out due to sickness. The Respondent apparently contends that Shawn was not entitled to sick leave either because he was not incapacitated and failed to come to work ''because of the weather'' or because he failed to produce medical verification of his injury.

ANALYSIS AND CONCLUSIONS

For the reasons stated above, I find the evidence creates the inference that the Respondent's failure to provide Shawn sick leave benefits in connection with this absence was the result of its union animus. I also find neither of its reasons for not doing so can withstand scrutiny. Its current claim that Shawn was not injured is not supported by any evidence which would contradict his credible testimony that he was. Moreover, it was not raised at the time when Shawn offered to produce a doctor's excuse and Morris said he was not concerned with whether the absence was justified. Later the same day, when Shawn raised the subject of paid sick leave with Creger, he was simply told he would not get it, without further elaboration. If the real reason was Shawn's failure to provide medical justification, presumably, Creger would have said so and given him the opportunity to produce it. The employee handbook provision concerning sick leave states: ''Department heads may require a doctor's excuse for any illness that requires time off from work.'' [Emphasis added.] The Respondent's actual sick leave policy, which was not generally made available to its employees, states in pertinent part: ''Any condition requiring an Employee to be away from work for more than three scheduled workdays in succession will require written verification from a medical doctor acceptable to the Employer.'' [Emphasis added.] Since Shawn was not out for more than three days and was not asked for medical verification, the Respondent's alleged reliance on his failure to produce such verification amounts to a pretext.[18] I find that the failure to provide Shawn with paid sick leave for the 3 days he missed in January 1994 due to an ankle injury was in retaliation for protected activity and violated Section 8(a)(1), (3), and (4).

e. *Uniforms*

The complaint alleges that on August 24, 1993, the Respondent violated the Act by ceasing to provide uniforms for mailroom employees. The affected employees were Shawn and Roger Jenkins.[19] For some time, full-time employees in the mailroom had been provided uniforms which were paid for by the Respondent. Shawn Jenkins testified that 2 or 3 weeks after the hearing in *Ironton Publications I* he was informed by business manager Hopkins that he would have to start paying for his uniforms. She told him that this was being done for budget reasons. Roger Jenkins testified that he had been provided with uniforms for at least 3 years without charge but, in June 1993, he began being charged for his uniforms.

Sherry Beckman testified that she and Jennifer Allen decided to discontinue paying for the mailroom employees' uniforms as a cost-cutting measure. This was communicated to the affected employees at a meeting held in December 1992. She was asked if the employees could pay for the uniforms if they wanted to keep them and said that she would check with the company accountant. She did so and the following week informed the employees that they could pay for their uniforms by payroll deduction. The employees chose the uniforms they wanted and the payroll deduction was to go into effect on January 1, 1993. Hopkins testified that she was present at the meeting in December 1992 when the mailroom employees were informed that if they wanted to continue getting uniforms they would have to pay for them. She also testified that, beginning on January 1, 1993, the Respondent's payroll and that of several other newspapers were going to be handled by a sister newspaper in Natchez, Mississippi. However, for unexplained reasons the uniform deduction was not put into effect and she did not discover it until June 1993. When the error was discovered, the employees were only charged for the current month. Allen also testified that the decision to cease paying for the uniforms was made in December 1992 and that payroll deduction for those who wanted to keep their uniforms and pay for them was to begin in January 1993.

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tified was, ''you must contact your supervisor.'' When shown that the handbook only required notification, he implied there was a different handbook that ''said something about personally notifying your supervisor.'' No such handbook was produced and I find this detracts from his credibility. I find Creger's answer to a leading question by the Respondent's counsel that the policy required employees ''to call the supervisor personally'' is insufficient to establish that the policy differed from what is stated in the employee handbook.

[17] Even if Creger was at the newspaper when Shawn called in on Friday, that does not contradict Shawn's credible testimony that he was told Creger was not there. The employee who took the call did not testify.

[18] It cannot rely on the provision in the ''Absence and Tardiness'' section of its revised employee handbook, requiring a doctor's excuse for any absence due to illness, because that provision was inserted without giving the Union notice and an opportunity for bargaining in violation of Sec. 8(a)(5), as is discussed below. *Kysor Industrial Corp*., 307 NLRB 598, 603 (1992).

[19] It appears that the name ''James'' was inadvertantly used in the complaint instead of ''Roger.'' There appears to be no dispute but that Roger Jenkins was one of the two employees of the mailroom affected at the time the Respondent's decision to ceased paying for the uniforms was implemented.

ANALYSIS AND CONCLUSIONS

The timing of the Respondent's actually ceasing to pay for the uniforms, which came at about the same time as the hearing in *Ironton Publications I*, appears suspect at first glance. However, I credit the testimony of Hopkins, who was a believeable witness and whose testimony was corroborated by Allen and Beckman, that there had been a decision to cease providing uniforms for the mailroom which was made and announced to the employees in December 1992.[20] I find no reason to believe that this decision was the result of protected activity on the mailroom employees' part at the time it was made, since Judge Linsky's decision indicates that union activity in the mailroom did not start until the latter part of March 1993. I credit the testimony of Allen and Beckman that it was a cost-cutting measure. I also credit the testimony of Hopkins that she did not realize that the payroll deductions that certain of the employees had authorized were not being made until June 1993. I find that the Respondent's ceasing to provide uniforms for employees of the mailroom was pursuant to a decision made before the employees' union activity began, that it was not precluded from carrying out that decision because union activity had started, and that it did not violate the Act. *Capitol Transit*, 289 NLRB 777, 779 (1988).

f. *Warnings to Shawn and Roger Jenkins on July 23, 1993*

On July 24, 1993, mailroom employees Shawn Jenkins and Roger Jenkins were issued written reprimands for putting the wrong advertising insert in the newspaper on the previous day. The error involved inserting part of an uncompleted insert, called ''Trends & Traditions,'' that was to go out the following week, rather than one advertising the Lancaster County Fair (the fair tab). Some of the inserted newspapers were taken to the office where the error was discovered, but not before approximately 1400 newspapers had gone out and could not be retrieved. The evidence shows that foreman Gary Creger posts a weekly insert schedule on a bulletin board in the mailroom indicating which inserts are to be inserted on a given day and there is also a calendar showing all the inserts for each month.

Creger came in at 8 a.m. to fly off (remove from the conveyor) the fair tab and the TV section as they came out of the pressroom and place them on carts. After doing so, he left the mailroom and went to Beckman's office. Roger and Shawn Jenkins began work at 10 and 10:30 a.m., respectively. It was Roger's job to set up and put newspapers into the insert machine and Shawn's to put inserts into the machine and fly off the inserted newspapers from the machine and take them to the strapper. Roger Jenkins testified that when he came in that morning Creger told him to insert the TV section and the fair tab, but that he got mixed up and selected the wrong insert.

[20] Her testimony is essentially uncontradicted. Roger Jenkins was not questioned about the December 1992 meeting. Shawn Jenkins could not recall such a meeting but admitted being told by Hopkins that the Respondent would no longer pay for uniforms. He could not remember when that occurred.

ANALYSIS AND CONCLUSIONS

I find that there is sufficient evidence to establish a prima facie case that these reprimands were discriminatory. The evidence of union animus has been discussed above, the two employees were known supporters of the Union and both were found to have been unlawfully reprimanded for a similar incident in *Ironton Publications I*. I also find that there are significant differences between the two incidents and that the Respondent has established that it would have issued these reprimands even absent union activity on the part of its employees. The evidence is undisputed that insert errors cost the Respondent money and that it has an interest in reducing if not eliminating them. In March 1993, there was a meeting of personnel of the mailroom specifically called to emphasize the need to avoid such errors. Contrary to the contentions of counsel for the General Counsel, there is no evidence that Creger had ''assembled the wrong inserts,'' that Roger and Shawn ''merely followed his instructions and placed the inserts in the newspaper'' or that Roger ''normally would not have had any responsibility with respect to the insertion of advertisements.'' Roger admitted that Creger told him which inserts to put in and that he got ''mixed up.'' It may be true that the insert Roger erroneously used was stored near the inserting machine, but even a cursory glance at it would have alerted him that he had the wrong one. Roger testified that he was familiar with the fair tab, which is run ''every year.'' Not only was the insert he used not the fair tab, it was a section of an unfinished booklet which started at page 19 and on which the pages had not been cut. According to the credible testimony of Beckman, Roger's responsibility for setting up the machine involved ''adjust[ing] each station to accommodate the size and thickness'' of each insert. The error should likewise have been apparent to Shawn who job it was to feed the inserts into the machine once it was set up.

I do not credit the testimony of either Shawn or Roger that the insert machine had broken down that morning, which I assume was meant to imply that it was confusion caused by a breakdown which led to the insert error. Neither referred to the machine being broken down in the written explanations they gave to Beckman on the day of the error and the credible testimony of Beckman and Creger was that there was no breakdown that day. Unlike the incident involved in *Ironton Publications I*, there is no evidence that Shawn and Roger were singled out for reprimands while others who were as responsible received none. In this case supervisor Creger, the only other person involved, received a similar reprimand. The evidence shows that before these reprimands were issued both Shawn and Roger were given the opportunity to explain their actions. Roger admitted mixing up the inserts and Shawn simply sought to place the blame for the mistake on Roger. The Respondent is entitled to take disciplinary action when warranted against erring employees, even prominent union supporters, so long as such actions are nondiscriminatory and for sufficient cause. *Advertisers Mfg. Co.*, 275 NLRB 100, 133 (1985). I find that the Respondent has established that these reprimands would have been issued to Shawn and Roger Jenkins even if they had not engaged in protected activity.

h. *Failure to recall Danny Jenkins and Bonita Smith*

In July 1993, the Respondent laid off part-time mailroom employees Danny Jenkins, Bonita Smith, Lavanda Boyd, and Phillip Barker, who did hand inserting and were paid a piece rate. Jenkins testified that he was told by Beckman that the Respondent was losing money on inserts and that the layoff would last about 5 or 6 weeks. Boyd and Barker were recalled on August 28 and thereafter were paid at an hourly rate. Jenkins and Smith, both of whom had signed union authorization cards which were introduced into evidence at the hearing in Ironton Publications I, were not recalled. The complaint alleges that they were not recalled because of protected activity in violation of Section 8(a)(1) and (3).

ANALYSIS AND CONCLUSIONS

I find there is sufficient evidence to support the inference that Jenkins and Smith were not recalled for discriminatory reasons, based on the Respondent's union animus and the other acts of discrimination discussed herein. I also find that the Respondent has shown that it would have taken the same action in the absence of protected activity. There is no allegation that the layoff of the hand inserters in July 1993 was discriminatory. Allen testified that when Boyd and Barker were recalled they were expected to do a full range of mailroom duties, not just hand inserting, and to be available when needed. She said that Jenkins and Smith were not recalled because of their limited availability. Danny Jenkins' testimony confirmed that he was only available to work on Saturdays because of his full-time job as an auto mechanic. There is nothing in the record to contradict Allen concerning Smith's availability. The time records in evidence indicate that, after being recalled, Boyd worked on Fridays and Saturdays and that Barker worked a number of different days each week. The one person subsequently hired as a regular part-time employee of the mailroom for whom there are hiring and time records, Michael Thomas, also worked several days a week besides Saturday.[21] I find that the evidence establishes that the failure to recall Jenkins and Smith was not based on their having engaged in protected activity.

i. *Discharge of James Jenkins*

As noted above, after being unlawfully laid off from the pressroom, James Jenkins subsequently took a job in the mailroom pursuant to a written agreement. In December 1993, James severely injured his knee. He called in to say he would be unable to work but agreed to go in and drive a delivery van when Creger told him there was no one available to drive it. The following afternoon he went to a doctor and had surgery on the knee that evening. During his recuperation, each time he saw his doctor he got a statement indicating how long he would be off which he took to the Respondent. On March 17, 1994, he was released to go back to work on light duty as of April 1. Upon receiving this release, Jennifer Allen contacted the doctor's office to inquire what ''light duty'' involved. When the doctor's assistant informed her of the limitations involved, Allen informed her that no such job was available. As a result, the doctor issued another work slip which extended his disability until the date of his next scheduled examination, April 21. After that examination, he was released for regular duty and took the slip to Creger who sent him to see Allen. She asked him if he had received a certified letter. He told her he had not and she gave him back the work release slip and told him the letter would explain everything. The letter informed him that, pursuant to the terms of the Respondent's sick leave policy, his employment automatically ceased when his leave of absence exceeded 90 working days; that the 90th working day was April 16, 1994; and that when he did not appear for work on April 19, 1994, his employment ended. James testified that he had never previously seen a copy of the Respondent's sick leave policy and during his leave of absence no one from the Employer had informed him he was in danger of losing his job. The complaint alleges that this discharge was unlawful.

ANALYSIS AND CONCLUSIONS

I find there is sufficient evidence to support the inference that James Jenkins' termination was the result of union animus for all of the reasons already discussed and the numerous violations of the Act found herein, which include a prior blatantly unlawful attempt to remove him from its employ. I also find that the Respondent has failed to establish that it would have taken the same action in the absence of protected activity on the part of James Jenkins and other employees. While it apparently contends that James was ''automatically'' terminated by the provisions of its sick leave policy, I find that is a pretext.

The pertinent provisions of the Respondent's sick leave policy state:

> 4. ACCIDENT OR SICKNESS IN EXCESS OF FOUR WEEKS: When accident or sickness requires an Employee to be away from work for more than four weeks, either cumulatively or consecutively, during any year, the following policy will apply:
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> e. . . . On the 91st day, the Employee will cease to receive any salary from the Employer, but will become eligible to receive disability benefits under the Employer's disability insurance plan (unless some exclusion is applicable). Thus, the Employee will continue to receive 60% of pay under the terms of the disability insurance policy. However, at this time, the Employee will automatically cease to be employed by the Employer.
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> 6. TERMINATION OF EMPLOYMENT: An Employee who begins receiving payments under the Employer's disability insurance (or who would begin receiving such payments but for any applicable exclusion from coverage) is considered as having terminated employment. Should the Employee regain the ability to work, and if that Employee's position has not been filled, the Employer may, in its discretion, rehire the Employee but is under no obligation to do so. The Employer will not, in making a decision to rehire, discriminate on the basis of race, religion, sex, color, national origin, or age, to the extent prohibited by law.

[21] From all that appears in the record, a Cathy Daniels may have worked in the mailroom for 2 days after the August 1993 recall, 1 day of which was a Friday.

This policy was adopted on January 1, 1988, while Tom Rattenbury was the publisher of the Respondent. Rattenbury testified that this policy was not distributed to the employees but was referenced in the employee handbook. He also testifed that the above-referenced language in the sick leave policy was meant to cover when an employee would be paid under its disability insurance plan and was not intended as a means of discharging an injured employee. The policy specifically provides that, if his position has not been filled when he regains the abilty to work, an employee who is terminated thereunder may be reemployed, in the Respondent's discretion. It is undisputed that James' position had not been filled as of the date he was released to return to work. The question then is whether the Respondent has established that it exercised its discretion not to rehire James based on a nondiscriminatory reason. I find that it has not. The evidence shows James was a long-time, experienced employee, who had become a target for discrimination almost immediately after the Respondent learned that he had joined the Union. Allen, who made the decision not to reemploy James, offered no reasons for her decision other than it was, in her view, the employer's prerogative not to do so. I find this insufficient to overcome the very strong inference created by the evidence as a whole that the Respondent relied upon an unprecedented and unjustified interpretation of a provision of its sick leave policy to rid itself of a union supporter.[22] I find that it violated Section 8(a)(1), (3), and (4) by terminating the employment of James Jenkins.

C. *Section* 8(a)(1) *and* (5) *Allegations*

1. Pressroom

a. *Pay increase for Jack Day*

The complaint alleges that the Respondent violated Section 8(a)(1) and (5) by granting a pay increase to assistant pressroom foreman Jack Day about November 1993 without notice to and bargaining with the Union. The Respondent's pay records show that Day received merit pay increases in October 1993 and again in January 1994. Union representative Walter Martin's credible uncontradicted testimony was that the Union was not notified or given an opportunity to bargain about these raises.

ANALYSIS AND CONCLUSIONS

The Respondent argues that because Day is a supervisor, it was under no obligation to bargain with the Union concerning his pay. As indicated above, this argument is foreclosed by the Board's decision in *Ironton Publications I* which specifically found that Day is not a supervisor. It also contends that the Union waived it rights to negotiate concerning merit increases and that it had authority under pertinent provision of the collective-bargaining agreement covering the pressroom to award a merit increase to Day. The contract provision in question, article V, states in pertinent part: ''The publisher shall have the right, in his sole discretion, to award merit increases; however, any merit increases shall continue until the expiration date of the contract.'' Since it had secured a waiver of the Union's statutory right to bargain over the timing and amount of merit increases, the Respondent was free to grant such increases without consulting the Union. Cf. *Colorado-Ute Electric Assn.*, 295 NLRB 607, 610 (1989).[23] I shall recommend that this allegation be dismissed.

b. *Removal of camera work*

The complaint alleges that the Respondent unilaterally removed certain camera work which had traditionally been done by pressroom employees and reassigned it to employees outside the pressroom. Counsel for the General Counsel contend that the work known as ''cutting color'' is what has been removed from the pressroom. The Respondent contends that none of the work performed by unit employees has been removed, rather, the function of ''manually separating color'' has been eliminated through the utilization of computers in the advertising department.

Former pressroom employee Joe Gann testified that cutting color was done by pressroom employees as long as he was employed by the Respondent and that it was not done in the camera department but in an area adjacent to it. He said ''cutting color'' consists of ''making separations and all for different color ads and so forth.'' After the separation is made, the image is transferred onto a printing plate. He estimated that the time spent cutting color averaged out to about one employee's 7-1/2 hour shift per week. On cross-examination, he testified that all the color cutting done in the pressroom is done from negatives. He said that the camera department takes work that is made up in other departments and shoots a picture of it and creates a negative, but that it has no involvement in the makeup of those items. Roger Jenkins testified that as long as he had worked in the pressroom ''cutting color'' was performed by pressroom employees. He testified that this was something different than ''color separation,'' but did not explain the difference. In March 1994, he was informed by production manager Gilbert Hutchcraft that ''they was going to start separating the color, color ads up front, that we won't be doing it anymore.'' Thereafter, he stopped doing such work. On cross-examination, he testified that they still cut color in the pressroom, that the pressroom employees still shoot the same number of negatives that need to be shot for color, and that they burn the same number of plates as before. What is different is that ''they separate up front the coloring in the color ads.''

Tony Morris testified that as marketing director he is familiar with the Respondent's advertising business and the use of computers to create ads. He testified that when an ad

[22] I consider that fact that the Respondent failed to provide its employees with the details of its sick leave policy, the fact that it failed to provide the information concerning the policy to the Union pursuant to a request in made on August 9, 1993, in connection with the mailroom contract negotiations, and the fact that Allen was aware in March 1994 that James had been released for light duty as of April 1, 1994, to be additional evidence that the Respondent actions concerning this matter were in bad faith and were motivated by union animus.

[23] Counsel for the General Counsel apparently contends that the Board's decision in *Ironton Publications I* determined that the Respondent's repudiation of the collective-bargaining agreement rendered it a nullity. There was no allegation in that case or this that the Respondent violated the Act by repudiating the contract. The Board's analysis of art. IV of the contract in *Ironton Publications I* indicates that it did not consider it to be a nullity. Slip op. at 1, fn. 3.

composed on the computer, which involves the use of color is produced, the color portions are put on separate pieces of paper. The pages of the ad are then sent to the camera department where negatives of however many pages there are in the ad are created.[24] The computer produces a more precise color separation than doing so manually with a knife. About five percent of the newspaper's color work that was previously done manually is now done by computer. There is no dispute but the Union was not notified and given the opportunity to bargain before this change in color separation was instituted.

ANALYSIS AND CONCLUSIONS

While it may be argued that the change in the color separation work that took place may not have technically involved ''camera work,'' as alleged in the complaint, in that color separation is something that is done to prepare the ads for the camera and there has been no significant change in the number of negatives being produced by pressroom personnel, it is clear that the Respondent was aware of the change that is in issue and that the matter has been fully litigated. It is also clear that a change in the process by which color ads are produced has been instituted, as now the computers operated by the advertising department personnel separate the color at the time the ads are composed instead of its being done manually with a knife by pressroom personnel. What is not clear is what effect this has had on the work of the pressroom. According to Gann, the color separation the pressroom employees do is done from negatives that they shoot. According to Roger Jenkins there has been no reduction in the number of negatives that they shoot. The evidence indicates that the computer separation process is a technological improvement that results in more a precise finished product. It also appears to be an integral part of the computer composing process with which pressroom employees have never been involved. Its decision to use this process does not appear to have been economically motivated, to have been amenable to bargaining or to have had a significant effect on the bargaining unit.[25] I shall recommend that this allegation be dismissed.

c. *Other allegations*

I have found that several of the Respondent's unilateral actions with respect to employees of the pressroom were taken in order to retaliate against them for engaging in protected activity in violation of Section 8(a)(1), (3), and (4) of the Act. I also find that since certain of these actions which changed existing terms and conditions of employment were taken without giving the Union notice and the opportunity to bargain, the Respondent violated Section 8(a)(5) by unilaterally imposing the additional duty of emptying trash cans on pressroom employees, *Ironton Publications*, supra, *Greensboro News & Record*, supra; by unilaterally reducing employee benefits by taking away Roger Jenkins' Christmas bonus and his participation in the profit-sharing plan and by reducing his vacation from 3 weeks to 2 weeks. *American Model & Pattern*, 277 NLRB 176, 183 (1985); *Storall Mfg. Co.*, 275 NLRB 220, 237 (1985). The Respondent acted unilaterally when it laid off James Jenkins from his position in the pressroom. Its apparent reason was to keep Jack Day, a nonsupporter of the Union in the pressroom. Management decisions concerning the order of succession of layoffs and layoffs linked to work assignments are mandatory subjects of bargaining and the Respondent's unilateral action violated Section 8(a)(5). *Holmes & Narver*, 309 NLRB 146, 147 (1992). Having found that lunch breaks in the pressroom were not changed, the allegation that such action violated Section 8(a)(5) should be dismissed.

2. Mailroom

a. *The bargaining unit*

The Respondent contends that certain of the complaint allegations relating to unilateral actions taken with respect to part-time employees of the mailroom must be dismissed because those employees are not included in the mailroom bargaining unit. By letter, dated June 22, 1993, from Walter Martin to Jennifer Allen, the Union requested that it recognize and commence bargaining with it as the collective-bargaining representative of the mailroom employees. The letter states that is a request to commence collective-bargaining ''for all Full Time and Part Time Employees Employed in the Mailroom,'' and refers to the authorization cards executed by mailroom employees, which were introduced in evidence in *Ironton Publications I*, as evidence of that it represents a majority of the mailroom employees.[26] By letter, dated July 1, from its attorney Craig A. Allen, Esq.,[27] the Respondent informed Martin that it would be ''happy to meet with you on behalf of the individuals in the mailroom'' and suggested dates and locations for meeting. The letter also inquired whether Martin considered the mailroom personnel an independent unit or a part of the pressroom unit. By letter, dated July 13, Martin responded that the Union considered the mailroom a separate unit and designated August 9 as a convenient date for the initial bargaining session. The letter again noted that the Union would bargain on behalf of all full-time and part-time employees of the mailroom. By letter, dated July 21, Allen confirmed the August 9 meeting date. Before that date, Allen sent a letter, dated July 16, informing the Union that on July 13 the Respondent had laid off mailroom employees Phillip Barker, Danny Jenkins, Cathy Boyd and Bonita Smith and asking it to advise him if it desired to discuss the matter. All of these employees were part-time. At the initial bargaining session, the Union presented a proposal which contained numerous provisions concerning part-time as well as full-time employees. It also presented the Respondent with a letter requesting, inter alia, employment information about all employees of the mailroom. The initial

[24] If there are two colors in the ad, two negatives are created; if three colors, three negatives.

[25] The evidence does not support counsel for the General Counsel's contention that 8 man-hours of work per week have been removed from the pressroom. According to Gann, all of the color separation work done in the pressroom averaged out 7-1/2 hours per week. The credible testimony of Morris was that only about five percent of that work is now done by computer. This would amount to about 23 minutes per week.

[26] Those cards were executed by Jeffrey Clutters, Danny Jenkins, Roger Jenkins, Shawn Jenkins, David Mart, Bonita Smith, and Larry Wilson. All but Roger and Shawn Jenkins were part-time employees.

[27] Allen had represented the Respondent in labor matters for some time and was its attorney in *Ironton Publications I*.

complaint in the instant case, issued on September 17, 1993, contained, inter alia, allegations of unilateral actions affecting the mailroom in violation of Section 8(a)(1) and (5) and specifically alleged in paragraph 6 that the approriate bargaining unit was: ''All mailroom employees employed by [Respondent] at its Ironton, Ohio facility, excluding all other employees, and all professional employees, guards and supervisors as defined in the Act.'' The Respondent's answer to this complaint, filed by Craig A. Allen, Esq., admitted the allegations in paragraph 6 and those in paragraph 7 concerning the Respondent's voluntary recognition of the Union as the bargaining representative of the mailroom unit. In response to the allegations concerning the July 13 layoff of mailroom employees, the answer raised no issue about the part-time employees not being included in the mailroom bargaining unit.

ANALYSIS AND CONCLUSIONS

I find that the Respondent has failed to establish its contention that there was no clear agreement by the parties with respect to what employees were included in the mailroom bargaining unit. The evidence shows that the Union made an unambiguous request for recognition as the bargaining representative of a unit which included all full-time and part-time employees and that the Respondent agreed to it without reservation. There is no credible evidence to the contrary or any to support the Respondent's apparent contention that Martin subsequently agreed to excluding part-time employees from the bargaining unit. I credit the testimony of Martin that after he presented the Union's initial proposal providing for benefits for both full and part-time employees, he understood the Respondent's position to be that it did not want the part-time employees included in those benefits. The hearing testimony of its negotiator and labor attorney Craig Allen was not inconsistent with that understanding. When considered in the light of Allen's actions in responding to the request for recognition and answering the complaint, there is no reasonable basis to conclude that the Respondent did not agree to recognize the Union as the representative of all mailroom employees.[28]

There is also no basis to conclude that a unit including part-time employees was not appropriate. Mailroom work records relating to the period around the time the request for recognition was made show that besides the foreman there were only two full-time employees but nine or ten part-time, who were working 1 to 5 days and in some cases more than 35 hours in a given week. The part-time employees work under the same working conditions and supervision and do essentially the same work as the full time. Even Danny Jenkins who worked only 1 day a week did so on a regular and continuing basis. The fact that he had a full-time job with another employer does not prevent him from being in the unit. *Tri-State Transportation Co.*, 289 NLRB 356 (1988); *Leaders-Nameoki, Inc.*, 237 NLRB 1269 (1978). These factors show that the part-time employees have a substantial community of interest with the full-time employees and should be included in the mailroom bargaining unit. *Pat's Blue Ribbons*, 286 NLRB 918 (1987); *Muncie Newspapers, Inc.*, 246 NLRB 1088 (1979).

b. *The July 1993 layoffs*

As was discussed above, on or about July 13 and 14, 1993, the Respondent laid off mailroom employees Lavanda Boyd, Phillip Barker, Danny Jenkins and Bonita Smith. Although it notified the Union of these layoffs after they occurred, the Respondent did not give it notice or an opportunity to bargain about them beforehand. The record establishes that the layoffs were undertaken to reduce labor costs. These unilateral layoffs violated Section 8(a)(5). *Synergy Gas Corp.*, 309 NLRB 179, 180–181 (1992); *Holmes & Narver*, supra.

c. *The revised employee handbook*

On or about August 24, 1993, the Respondent issued a revised handbook to its employees including those in the mailroom. It is alleged that there were material changes in policies contained in the old handbook. A reading of the new handbook shows changes in the provisions concerning employee breaks, which, inter alia, restricted where breaks could be taken; absence and tardiness, which included a requirement of producing a doctor's excuse for any absence due to illness and a new section on funeral leave; probationary period, which attached a probationary period to all transfers, reassignments and/or promotions; uniforms; dress and appearance, which, inter alia, included sanctions for inappropriate attire and restrictions on employee demeanor; and a new smoking policy. The Respondent did not give the Union notice or an opportunity to bargain before issuing the new handbook. The Respondent contends that the smoking policy was instituted prior to its recognition of the Union as the bargaining representative of the mailroom employees and that the other alleged changes were not material.

ANALYSIS AND CONCLUSIONS

I find that the Respondent had announced and effected the change concerning providing uniforms to the mailroom before it recognized the Union and that this change, as reflected in the new handbook, did not violate Section 8(a)(5). *E.I. duPont & Co.*, 303 NLRB 631, 633–634 (1991). Jennifer Allen testified that she had determined that there was a need to discontinue smoking around heavy equipment. To implement that decision, she issued a memorandum to all employees on May 26, 1993, announcing the institution of a ''no smoking policy,'' effective June 1, 1993, which prohibited smoking in all open areas of the plant including the pressroom and cameraroom and provided for an outside smoking area near the loading dock. Although this policy was instituted before the Union's request for recognition as the bargaining representative of the mailroom employees, it also impacted on the members of the pressroom bargaining unit who were already represented. Since the Respondent instituted the new smoking policy unilaterally without notice to the Union and an opportunity to bargain, its action violated Section 8(a)(5). *YHA, Inc.*, 307 NLRB 782 (1992). With respect to

[28] At the hearing, counsel for the Respondent moved to amend the answer to the initial complaint to deny the allegation in par. 6(a) concerning the makeup of the mailroom bargaining unit. I find that the motion should be denied. There is no reason to believe that the admission in the original answer was the result of an error or oversight. From all that appears, the purpose of the motion is to eliminate probative evidence concerning the scope of the bargaining unit to which the Respondent initially agreed and which its new counsel finds undercuts his position on this issue.

the other changes noted above, there is no evidence of any written or oral changes in the policies contained in the old handbook which were instituted prior to the time the Union was recognized. Each relates to the terms and conditions of employment and could not be unilaterally changed by the employer. *Livingston Pipe & Tube*, 303 NLRB 873, 879 (1991); *Equitable Gas Co*., 303 NLRB 925 (1991).

d. *Changes in assistant foreman's duties*

As discussed above, on July 13, 1993, the Respondent presented assistant foreman Roger Jenkins with a job description for his position which I have found significantly changed his duties and added supervisory functions he had not previously performed in order to remove the position from the bargaining unit. The new duties were to become effective immediately. The Union was not informed about or given an opportunity to bargain about these changes. I find that the Respondent violated Section 8(a)(5) by these unilateral changes. *Christopher Street Owners Corp*., supra; *Fry Foods, Inc*., 241 NLRB 76, 88 (1979).

e. *Abolition of piece rate*

Mailroom employees Phillip Barker and Lavanda Boyd were laid off in July 1993 and recalled on August 28. Boyd testified that prior to being laid off they primarily did hand inserting and were paid a piece rate for each insert. When recalled they did the same inserting work but were paid at an hourly rate. Boyd testified that she is earning less since being recalled at the hourly rate. The Respondent did not give the Union notice or an opportunity to bargain about this change in how these employees were compensated. Allen testified that when the hand inserters were recalled they performed a variety of duties and earn more now than before the abolition of the piece rate.[29]

The evidence is inconslusive as to whether Boyd and Barker are earning more or less since the piece rate was abolished, but that is not the issue. The alleged violation is that the Respondent unilaterally changed the employees' method of compensation from a piece rate to an hourly rate. The Respondent violated Section 8(a)(5) by failing to notify and afford the Union an opportunity to bargain over this change. *Advertiser's Mfg. Co*., 280 NLRB 1185 (1986); *Master Slack*, 230 NLRB 1054 (1977).

f. *Alleged change in lunch period*

Lavanda Boyd testified that before she was laid off she took a lunch break of one hour or more on every day that she worked. On one day after she was recalled to work in August 1993, she went to lunch and returned about one hour later. When she returned one of the other employees told her she was only allowed to take a half-hour for lunch and later that afternoon Creger asked why she had taken an hour. She was not disciplined, but since then, she has only been allowed to take a half-hour lunch break. It is alleged that this constituted another unilateral change in working conditions. Creger testified that all employees of the mailroom are given a half-hour for lunch unless he authorizes a longer period depending on the workload and the employee's needs.

Having observed her testimony, I do not believe that Boyd had a clear understanding as to what the lunch break policy was or that her testimony, without more, is sufficient to establish that employees were allowed to take an hour or more whenever they chose.[30] In this case, I credit the testimony of Creger and find that the Respondent made no unilateral change in the length of the normal lunch break.

g. *Other allegations*

The complaint also alleges that the Respondent violated Section 8(a)(5) by altering its past policy concerning recalling laid off employees and by not granting Shawn Jenkins paid sick leave for his time off in January 1994 due to an injury. There is no evidence to support a finding that the Respondent's failure to recall Danny Jenkins and Bonita Smith resulted from a policy change whereby it hired new employees instead of recalling those on layoff. I have found that the Respondent has shown that they were not recalled because they were unavailable to work on the days that the newly hired employee was needed.[31] While the Respondent unlawfully denied Shawn Jenkins the sick leave benefits to which he was entitled, I have found that this was an individual act of retaliation because of his protected activity. There is no evidence that there has been a unilateral change in the sick leave policy.

IV. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discriminatorily discharged James Jenkins, it should be ordered to offer him immediate and full reinstatement to his former position or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges previously enjoyed, and make him whole for any loss of earnings or benefits suffered by reason of the discrimination against him, plus interest.[32] Having found that the Respondent unlawfully laid off Phillip Barker, Lavanda Boyd, Danny Jenkins and Bonita Smith without first bargaining with the Union, it should be similarly ordered to reinstate them and make them whole for any losses. *Synergy Gas Corp*., supra. Backpay shall be computed as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest to

[29] I find there is no factual or legal basis for the Respondent's claimed affirmative defense, that the Union's alleged failure to bargain in good faith over a new contract for the pressroom, somehow excused its unilateral actions with respect to the mailroom.

[30] Neither Shawn nor Roger Jenkins, who were long-time employees of the mailroom and testified extensively about its operations, was asked about the length of the lunch break. However, in his testimony about the reprimand he received for leaving the plant during a lunch break, Shawn implied that the normal break was a half-hour.

[31] They are still entitled to reinstatement because of their unlawful layoffs.

[32] I find that there is no evidence to establish that James Jenkins is disqualified from reinstatement because of an alleged threat to damage the press. There was testimony that, after he was unlawfully laid off from the pressroom, James stated that he ''could make it rough'' on the Respondent. That statement without more does not constitue a threat and is consistent with an intention to seek redress though any number of lawful means.

be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent has continued to commit unfair labor practices similar to those found in *Ironton Publications I* and these unfair labor practices involved its highest level of management. I find that its actions demonstrate a proclivity for violating the Act and a general disregard for its employees' Section 7 rights and that a broad cease and desist order is appropriate. *Clark Manor Nursing Home Corp*., 254 NLRB 455, 459 (1981); *Hickmont Foods, Inc*., 242 NLRB 1357 (1979).

CONCLUSIONS OF LAW

1. The Respondent, Ironton Publications, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The pressroom bargaining unit is comprised of all employees employed in the operation of the pressroom, including the camera, offset platemaking and all press operations, excluding all other employees, and all professional employees, guards and supervisors as defined in the Act.

4. The mailroom bargaining unit is comprised of all full-time and part-time employees of the mailroom, excluding all other employees, guards and supervisors as defined in the Act.

5. The Respondent violated Section 8(a)(1), (3), and (4) of the Act by:

(a) Laying off James Jenkins on September 22, 1993, and refusing to recall him as an employee of the pressroom.

(b) Discharging James Jenkins as an employee of the mailroom on or about April 20, 1994.

(c) Issuing a disciplinary reprimand to Roger Jenkins on or about November 11, 1993.

(d) Reducing Roger Jenkins' benefits by denying him a Christmas bonus in 1993, by denying him participation in its profit-sharing plan, and by reducing his vacation from 3 weeks to 2 weeks.

(e) Imposing on employees of the pressroom the additional duty of emptying trash cans in or about March 1994.

(f) Changing the duties of Roger Jenkins as assistant foreman of the mailroom on or about July 13, 1993, which caused him to give up that position.

(g) Issuing disciplinary reprimands to Shawn Jenkins on or about June 22 and July 13, 1993 and issuing him a disciplinary reprimand and placing him on probation for 60 days on or about January 11, 1994.

(h) Refusing to pay sick leave benefits to Shawn Jenkins for the days he missed work due to an injury in January 1994.

6. The Respondent violated Section 8(a)(1) and (5) of the Act by:

(a) Laying off mailroom employees Phillip Barker, Lavanda Boyd, Danny Jenkins and Bonita Smith on or about July 13, 1993, without giving the Union notice or an opportunity to bargain about the layoff.

(b) Laying off pressroom employee James Jenkins on or about September 22, 1993, without giving the Union notice or an opportunity to bargain about the layoff.

(c) Reducing the benefits of pressroom employee Roger Jenkins by denying him a 1993 Christmas bonus, by denying him participation in it profit-sharing plan, and by reducing his vacation from 3 weeks to 2 weeks without giving the Union notice or an opportunity to bargain about these reductions.

(d) Changing the duties of the assistant foreman of the mailroom on or about July 13, 1993, and making it a supervisory position without giving the Union notice or an opportunity to bargain about these changes.

(e) Issuing, on or about July 13, 1993, a revised employee handbook which made significant changes in certain personnel policies affecting unit employees' terms and conditions of employment without giving the Union notice or an opportunity to bargain about these changes.

(f) Changing the method of payment to hand inserters in the mailroom from a piece rate to an hourly rate on or about August 28, 1993, without giving the Union notice or an opportunity to bargain about this change.

(f) Changing the duties of pressroom employees by requiring them to empty trash cans beginning in or about March 1994, without giving the Union notice and an opportunity to bargain about this change.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. The Respondent did not engage in those unfair labor practices alleged in the consolidated complaint not specifically found herein.

[Recommended Order omitted from publication.]